DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-10882	*** CAPITAL CASE ***
Title:	Freddie Lee Hall, Petitioner
	v.
	Florida
Docketed:	June 20, 2013
Lower Ct:	Supreme Court of Florida
Case Nos.:	(SC10-1335)
Decision Date:	December 20, 2012
Rehearing Denied:	March 8, 2013

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Jun 6 2013	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due July 22, 2013)
Jul 18 2013	Brief of respondent Florida in opposition filed.
Aug 1 2013	DISTRIBUTED for Conference of September 30, 2013.
Oct 7 2013	DISTRIBUTED for Conference of October 11, 2013.
Oct 15 2013	DISTRIBUTED for Conference of October 18, 2013.
Oct 21 2013	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Nov 21 2013	The time to file the joint appendix and petitioner's brief on the merits is extended to and including December 16, 2013.
Nov 21 2013	The time to file respondent's brief on the merits is extended to and including January 27, 2014.
Nov 25 2013	SET FOR ARGUMENT ON Monday, March 3, 2014
Dec 16 2013	Joint appendix filed (2 volumes.) (Statement of costs filed.)
Dec 16 2013	Brief of petitioner Freddie Lee Hall filed.
Dec 19 2013	Motion for leave to file amici brief filed by Professors Adam Lamparello and Charles MacLean in support of neither party.
Dec 23 2013	Brief amici curiae of American Psychological Association, et al. filed.
Dec 23 2013	Brief amici curiae of Former Judges, and Law Enforcement Officials filed.
Dec 23 2013	Brief amicus curiae of American Bar Association filed.
Dec 23 2013	Brief amici curiae of The American Association on Intellectual and Developmental Disabilities, et al. filed.
Jan 8 2014	Record received from the Supreme Court of Florida. (1 Box)
Jan 9 2014	CIRCULATED

Jan 13 2014	Motion for leave to file amici brief filed by Professors Adam Lamparello and Charles MacLean in support of neither party GRANTED.
Jan 27 2014	Brief of respondent Florida filed. (Distributed)
Feb 3 2014	Brief amici curiae of States of Arizona, et al. filed. (Distributed)
Feb 3 2014	Brief amicus curiae of Criminal Justice Legal Foundation filed. (Distributed)
Feb 24 2014	Reply of petitioner Freddie Lee Hall filed. (Distributed)
Mar 3 2014	Argued. For petitioner: Seth P. Waxman, Washington, D. C. For respondent: Allen Winsor, Solicitor General, Tallahassee, Fla.
May 22 2014	Record received from U.S.D.C. Middle District of Florida. The record is electronic and not available on PACER

PETITION FOR WRIT OF CERTIORARI

12-10882

No._____

Supreme Court, U.S.
FILED
JUN 06 2013
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

FREDDIE LEE HALL-PETITIONER

VS.

MICHAEL D. CREWS, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS

AND

PAMELA JO BONDI, ATTORNEY GENERAL,
STATE OF FLORIDA

RESPONDENTS.

ON PETITION OF CERTIORARI TO
THE SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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ORIGINAL

CAPITAL CASE

QUESTIONS PRESENTED

Whether the Florida scheme for identifying mentally retarded defendants in capital cases violates *Atkins v. Virginia*.

LIST OF PARTIES

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IN THE SUPREME COURT OF THE UNITED STATES

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ON PETITION OF CERTIORARI TO
THE SUPREME COURT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The Opinion of the Supreme Court of Florida following appeal of judgment and sentence appears as Appendix A to the Petition and is reported at *Hall v. State*, 403 So.2d 1321 (Fla. 1981).

The Opinion of the Supreme Court of Florida following appeal after resentencing appears as Appendix B to the Petition and is reported at *Hall v. State*, 541 So.2d 1125 (Fla. 1989).

The Opinion of the Supreme Court of Florida following postconviction proceedings appears as Appendix C to the Petition and is reported as *Hall v. State*, 742 So.2d 225 (Fla. 1999).

The Opinion of the Supreme Court of Florida following postconviction proceedings on the issue of mental retardation appears as Appendix D to the Petition and is reported as *Hall v. State*, 109 So.3d 704 (Fla. 2012)

JURISDICTION

The date the Florida Supreme Court decided the case was March 8, 2013 on an Order denying a Motion for Rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

28 U.S.C. § 2254 (a)-(e) provides:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that:
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)
>
> (i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> (b)(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.
>
> (b)(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under

the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(e)(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that

(A) the claim relies on -

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

STATEMENT OF THE CASE

The issue of whether Freddie Lee Hall is mentally retarded was first addressed by the Florida State Courts at his resentencing proceedings in 1992. *Hall v. State*, 614 So.2d 473 (Fla. 1993). At that time the resentencing state court judge and the Florida Supreme Court made factual

findings that Freddie Lee Hall had been "mentally retarded all of his life". *Id. at* 480. At that time this Court's opinion in *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, L.Ed. 2d 335 (2002) had not been rendered and execution of mentally retarded persons was allowed. However, two dissenting Florida Justices viewed the execution of Freddie Lee Hall as cruel or unusual and a violation of the Florida State Constitution and the Eighth Amendment due to evolving standards of decency. *Hall* at 480. The Dissenters outlined the facts and circumstances that led to the finding that Freddie Lee Hall had been retarded all of his life as follows:

> The testimony reflects that Hall has an IQ of 60; he suffers from organic brain damage, chronic psychosis, a speech impediment; and a learning disability; he is functionally illiterate; and has a short term memory equivalent to that of a first grader. The defenses four expert witnesses who testified regarding Hall's mental condition stated that his handicaps would have affected him at the time of the crime. As the trial judge noted in the resentencing order, Freddie Lee Hall was "raised under the most horrible family circumstances imaginable".
>
> Indeed, the trial judge found that Hall had established substantial mitigation. The judge wrote that the evidence conclusively demonstrated that Hall "may have been suffering from mental and emotional disturbances and may have been, to some extent, unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." Additionally, the judge found that Hall suffers from organic brain damage, **has been mentally retarded all of his life**, suffers from mental illness, suffered tremendous emotional deprivation and disturbances throughout his life, suffered tremendous physical abuse and torture as a child, and has learning disabilities and a distinct speech impediment that adversely affected his development.
>
> Hall's mental deficiency as an adult is not surprising. The sixteenth of seventeen children, Hall was tortured by his mother and abused by neighbors. Various relatives testified that Hall's Mother tied him in a "croaker" sack, swung it over a fire, and beat him; buried him in the sand up to his neck to "strengthen his legs"; tied his hands to a rope that was attached to a ceiling beam and beat him while he was naked; locked him in a smokehouse for long intervals; and held a gun on Hall and his siblings while she poked them with sticks. Hall's Mother withheld food from her children because she believed a famine was imminent, and she allowed neighbors to punish Hall by forcing him to stay underneath a bed for an entire day.
>
> Hall's school records reflect his mental deficiencies. His teachers in the fourth, sixth,

> seventh, and eighth grades described him as **mentally retarded**. His fifth grade teacher stated that he was mentally maladjusted, and still another teacher wrote that "his mental maturity is far below his chronological age."

Id. Emphasis added.

After his death sentence was affirmed by the Florida Courts, Mr. Hall filed a motion for postconviction relief which was denied. *Hall v. State*, 742 So.2d 225 (Fla. 1999). In that opinion the Florida Court stated "there is no doubt that Hall has serious mental difficulties, and is **probably somewhat retarded**" *Id. at* 230 *Emphasis added.*

After this Court rendered its opinion in *Atkins* in 2002 Mr. Hall filed a motion in accordance with the Florida Rule of Criminal Procedure 3.203, which had been adopted by the Florida Supreme Court to provide a mechanism for Capital Defendants to file "Atkins" claims under Florida Statute 921.137. *Hall v. State*, 109 So.3d 704 (Fla. 2012). Over the objection of his counsel, in December of 2009, Mr. Hall was forced to prove he was mentally retarded again under an allegedly different standard for determining mental retardation than had been used in 1992 as set forth in Florida Statute 921.137. Another evidentiary hearing was conducted on the issue of whether Mr. Hall met the Florida Statutory criteria for mental retardation. *Id.* At 709. The trial judge found that Mr. Hall did not meet the standard for mental retardation, and that decision was affirmed by the Florida Supreme Court. *Id.* This Writ follows.

REASONS FOR GRANTING THE PETITION

THE FLORIDA COURTS DECIDED AN IMPORTANT FEDERAL QUESTION THAT CONFLICTS WITH THIS COURTS DECISION IN *ATKINS* BY INVENTING A NEW DEFINITION OF MENTAL RETARDATION WHICH REQUIRES A NON-EXISTENT "BRIGHT LINE" STANDARDIZED IQ SCORE OF 70 OR BELOW WHICH IS

CONTRARY TO THE RECOMMENDATIONS OF THE INVENTORS AND DEVELOPERS OF THE VERY IQ TESTS THE FLORIDA RETARDATION STATUTE RELIES UPON BY IGNORING THE SCIENTIFICALLY ACCEPTED AND ESSENTIAL STANDARD ERROR OF MEASUREMENT AND USE OF CONFIDENCE INTERVALS. WITHOUT INTERVENTION BY THIS COURT FLORIDA WILL EXECUTE MR. HALL AND OTHER MENTALLY RETARDED PERSONS, IN VIOLATION OF THE EIGHTH AMENDMENT, BASED UPON A FUNDAMENTALLY FLAWED UNDERSTANDING OF LONGSTANDING PRINCIPLES CONCERNING THE INTERPRETATION AND USE OF STANDARDIZED INTELLIGENCE TESTS.

A review of the Florida Supreme Court's opinion holding that Mr. Hall became un-retarded between 1992 and 2009 reveals confusion and a call for help and guidance to this court from the majority, and outright disgust from the dissenters at the prospect of executing a clearly mentally retarded human being.

The cause of confusion by the Supreme Court of Florida as to the proper standard for determining mental retardation is Florida Statute 921.137 which was enacted just prior to this Court's opinion in *Atkins*. As for the standard for determining mental retardation the statute states:

> Mental retardation is significantly subaverage intellectual functioning existing concurrently with deficits in adaptive behavior and manifesting during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the Rules of the Agency for Persons with Disabilities. The term "adaptive behavior: for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, culture group, and community. The Agency for Persons with Disabilities shall adopt rules to specify the standardized intelligence tests as provided in 921.137(1).

Fla. Stat. 921.137

The Florida Supreme Court held that Mr. Hall could not meet the first prong of the statutory mental retardation statute because his IQ was not measured at below 70. At the 2009 evidentiary hearing Dr. Gregory Prichard testified he administered the WAIS III, the latest version of the Weschler Adult Intelligence Scale, and the score was 71. *Hall* 109 So.3d at 709. The Florida Supreme Court addressed the issue of the interpretation of the "cut off" score requirement for a finding of mental retardation as follows:

> In *Cherry v. State*, 959 So.2d 702 (2007), we determined that the proper interpretation of section 921.137. Cherry argued that an IQ measurement is more appropriately expressed as a range of scores rather than a concrete number because of the SEM. We held "Both section 921.137 and rule 3.203 provide that significantly subaverage general intellectual functioning means "performance that is two or more standard deviations from the mean score on a standardized intelligence test." One standard deviation on the WAIS-III, the IQ test administered in this case, is 15 points, so two standard deviations away from the mean of 100 is an IQ score of 70...The statute does not use the word approximate, nor does it reference the SEM. Thus, the language of the statute and the corresponding rule are clear. We defer to the plain meaning of the statues.....
>
> On appeal, Franqui raised essentially the same claim Hall raises here, namely: this Court's interpretation of mental retardation mandating a cut off score of 70 or below to met the first prong of the test for mental retardation is contrary to *Atkins*. We found that(1) in HN7 the United States Supreme Court did not mandate a specific IQ score or range for a finding of mental retardation in *Atkins* (2) Florida's statute prohibiting the execution of the mentally retarded preceded *Atkins*; (3)proper interpretation of section 921.137 was under the plain language of the statute providing that "significantly subaverage general intellectual functioning means performance that is "two or more standard deviations from the mean score on a standardized intelligence test" and does not require the Court to consider the standard error of measurement (SEM; and (4) one standard deviation on the test in question is fifteen points, thus 70 is the appropriate score based on the plain language of 921.137 and not a range of scores.)

Hall 109 So.3d at 710-711.

In the concurring opinion one Florida Justice outlined the Division within the Court and the lack of certainty associated with the inflexible bright-line cut off score.

> I appreciate the views expressed by the dissents written by Justice Labarga and Justice Perry. I echo the sentiment that Justice Labarga highlights in his dissent:" The imposition of an inflexible bright-line cutoff score of 70, even if recognized as often describing the upper range of mild mental retardation, is not in every case an appropriate way to enforce the restriction on execution of the mentally retarded." Dissenting op. at 27 (Labarga, J.). Unquestionably, clinical definitions of mental retardation recognize the need for application of the SEM and the use of clinical judgment. In fact, the American Psychiatric Association (APA) proposes a revision to the definition of mental retardation that will replace the use of a numerical score for mental retardation and instead refer to an intellectual Developmental Disorder (IDD). However, unless this Court were to recede from *Cherry*, 959 So.2d at 712-13, as reaffirmed in *Nixon v. State*, 2 So.2d 3d 137 , 142-143 (Fla. 2009), and more recently in *Franqui v. State*, 59 So.3d 82, 92-94 (Fla. 2011), a plain language interpretation of Florida's bright-line cutoff score will remain the rule of law of this state.
>
> ...
>
> At some point in the future, the United States Supreme Court may determine that a bright-line cutoff score is unconstitutional because of the risk of executing an individual who is in fact mentally retarded. However, until that time, this court is not at liberty to deviate from the plain language of 921.137(1). Without a change from the Legislature or further direction from the United States Supreme Court, I conclude that the statute adopted by the Legislature and the precedent set forth by this Court require that the trial court's order finding Hall not to be mentally retarded be affirmed.

Hall 109 3d at 714-715.

The dissenting opinions in the Hall Florida Supreme Court opinion further illustrate the Division within that Court, and the need for this Court to intervene and provide the requested guidance.

> I dissent from the holding of the majority that application of the statutory bright-line cutoff score of a full scale IQ of 70 for determinating mental retardation as a bar to execution comports with the Supreme Court's decision in *Atkins v. Virginia*, under the facts and circumstances of this case. I write to express my deep concern with the fact that even though Hall was found to be retarded long before the Supreme Court decided *Atkins*, and even though evidence was presented below that

he remains retarded, we are unable to give effect to the mandate of *Atkins* under the definition of "mental retardation" set forth in *section* 921.137 (1).

...

The situation present in Florida, in which the Legislature has established a bright-line cutoff score that this Court has upheld, now creates a significant risk that a defendant who has once been found to be mentally retarded may still be executed. I believe this result is not in accord with the rationale underlying the constitutional bar to execution of the mentally retarded, which the United States Supreme Court set forth in *Atkins*. A state's procedural safeguards must protect against an erroneous conclusion that the offender is *not* mentally retarded. In order to meet constitutional muster, I believe that Florida's statutory rule provisions, which were put into place with the laudable goal of assuring that mentally retarded individuals are not executed, must be crafted or at a minimum construed - so as to avoid the unwarrented risk of an erroneous mental retardation determination that would allow those who are mentally retarded to be executed.

...

If the bar against executing the mentally retarded is to mean anything, Freddie Lee Hall cannot be executed. Hall "has been mentally retarded his whole life." I do not disagree with my esteemed colleagues that section 921.137 (1) and our case law provide that a defendant establish an IQ below 70 to be ineligible to be executed, but that statute as applied here reaches an absurd result. Because this is my belief, I respectfully dissent.

...

Hall is the poster child for mental retardation claims because the record here clearly demonstrates that Hall is mentally retarded. The fact that our statutory standard does not agree only serves to illustrate a flaw in the statute.

...

The current interpretation of the statutory scheme will lead to the execution of a retarded man in this case. Hall had been found by the courts to be mentally retarded before the statute was adopted. Once the statute is applied, Hall morphs from someone who has been "mentally retarded his entire life" to someone who is statutorily barred from attempting to demonstrate concurrent deficits in adaptive functioning to establish retardation. Because this cannot be in the interest of justice, I dissent.

Hall at 109 So.3d 715-719 (Dissenting Opinion)

The Florida state court's interpretation of Florida Statue 921.137 as calling for a bright line IQ "obtained score" of 70 or below before a finding of mental retardation can't be made is an unreasonable interpretation of the Statute and contrary to the mandates of *Atkins*.

More specifically, the Florida court is interpreting the existence of a bright line score which does not exist. Florida Statute 192.137 provides that the Agency for Persons with Disabilities adopt rules to specify the standardized intelligence tests to be used. The Agency has selected the tests as follows:

> 65G-4.011 Determination of Mental Retardation in Capital Felony Cases: Intelligence; Tests to be Administered.
> (1) When a defendant convicted of a capital felony is suspected of having or determined to have mental retardation, intelligence tests to determine intellectual functioning as specified below shall be administered by a qualified professional who is authorized in accordance with Florida Statutes to perform evaluations in Florida. The test shall consist of an individually administered evaluation, which is valid and reliable for the purpose of determining intelligence. The tests specified below shall be used.
> (a) The Stanford-Binet Intelligence Scale.
> (b) Wechsler Intelligence Scale.

It is not surprising that the Agency selected the Weschler and the Stanford-Binet as they are the two most commonly used instruments in evaluating mental retardation. However, neither instrument is capable of giving a bright line score. Mr. Hall was not given the Stanford Binet, but he was given several Weschler IQ tests, as the opinion points out. However, the *WAIS IV Administrative and Scoring Manual Tables A.3-A.7* p. 220 -225 specifically recommend a confidence interval of 95% with a Standard Error of Measurement of + or - five points. This is because the inventors of the Weschler test acknowledge and understand that is does not provide a bright line Full Scale IQ score, and encourages a range that the persons IQ falls within.

It is contrary to a reasonable interpretation of the Statute that the Legislature would have intended that the Agency for Persons with Disabilities adopt the rules to specify standardized intelligence tests to be used for a mental retardation evaluation, and then ignore the Technical

Manual for the scoring and interpretation of the tests. Nowhere does the State of Florida provide any justification for ignoring the recommendations of the inventors of the IQ tests that are to be used for evaluating mental retardation. It is nonsensical.

The Weschler Aduilt Intelligence scale was first introduced in 1937, and has been revised four times since then. Many thousands of hours have been spent re-norming the test, adjusting the questions, and providing a technical manual for administering the test. In its current form the WAIS IV has 23 different sub-tests which are designed to provide as close a measure of IQ as is currently possible. Those subtests include Block Design, similarities, Digit span, Matrix Reasoning, Vocabulary, Arithmetic, Symbol Search, Visual Puzzles, Information, Coding, Letter-number Seq., Figure Weights, Comprehension, Cancellation, Picture completion, Word reading, Psuedoword decoding, Numerical Operations, Math Reasoning, Spelling. Listening Comprehension, and Oral Expression. The WAIS test, as administered to Mr. Hall, is a very precise instrument, much like a fine Swiss watch. However, for it to be effective, and the results to be properly interpreted, the makers must be listened to concerning the tolerances of the test - taking into account the SEM and confidence intervals. Unfortunately, the human race has not yet developed a test for mental retardation that is like a blood pressure machine, hooked up to a defendants arm with a gage that reads R for retarded, or N for not retarded. The State of Florida cannot invent out of whole clothe a bright line cutoff for determining mental retardation, where no instrument exists that can measure IQ with that level of precision. That is why the WAIS test gives a range of scores, not a specific score. The State of Florida cannot by decree make a cow a chicken, nor can it make standardized IQ results more precise than the inventors of those tests say is reasonable. Daivid Weschler and the WAIS-III technical manual states "The standard error of measurement is used to calculate the confidence interval, or the band of scores, around the observed score in which the individuals true score is likely to fall .. The examiner can use

confidence intervals to report an individuals score as an interval that is likely to contain the individuals true score. Confidence intervals also serve as a reminder that **measurement error is inherent in all test scores and that the observed test score is only a estimate of true ability.**" (*Davis Weschler, WAIS-R Manual; Weschler Adult Intelligence* Scale 0 Revised 31 (1981); *See The Psychological Corporation, WAIS-III - WMS-III Technical Manual53* (1997)*(emphasis added)*; (*See Also The American Psychiatric Association's Resource Documenton Mental Retardation and Capital Sentencing: Implementing* Atkins v. Virginia, 32 J. AM.ACAD. PSYCHIATRY L. 304, 305-06 (2004) (stating that the American Psychiatric Association's Council on Psychiatry and Law takes the position that "incorporation of a specific cut off score is inappropriate, not only because different tests have different scoring norms, but also because designating a specific score ignores the standard error of measurement and attributes greater precision to these measures than they can support")(*See also* Alfred L. Brophy, *Confidence Intervals for True Scores and Retest Scores on Clinical Tests,* 42(6) J. OF CLINICAL PSYCHOL. 989 (1986); Robert G. Knight, *On Interpreting the Several Standard Errors of the WAIS-R: Some Further Tables,* 51(5) J. OF CONSULTING **AND** CLINICAL PSYCHOL. 671 (1983) (describing three methods of **SEM** for WAIS).

While this Court granted the states leeway in crafting appropriate methods to enforce the constitutional restriction against execution of the mentally retarded (*Atkins* at 342), it did not grant the authority for a state to create out of thin air a definition of mental retardation which undoubtably will fail to identify mentally retarded capital defendants. This Court stated that the then existing statutory definitions of mental retardation in those states that prohibited executing the mentally retarded "are not identical but generally conform to the clinical definitions." *Id* at FN 22. This Court also stated that "mild" mental retardation is typically used to describe people with an IQ level of 50-55 to **approximately** 70. *Id* at 312 FN 3 *emphasis added.* And this Court stated

that "it is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff score for the intellectual function prong of the mental retardation definition. *Id* at FN 5. Clearly in the *Atkins* opinion, this Court relied upon the clinical definitions of mental retardation by stating "as discussed above, **clinical** definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communications, self-care, and self-direction that become manifest before age 18. *Id* at 314 *emphasis added*. Nowhere in *Atkins* does this Court state that a state can significantly alter the clinical definition of mental retardation by eliminating the use of the SEM and confidence intervals which the creators of the standardized IQ tests have repeatedly said are necessary for a proper administration and understanding of the test results.

CONCLUSION

The Florida Courts and statutory scheme creation, without justification, of a nonexistent and inflexible "bright-line" IQ score, and ignoring the instructions of the creators of the tests that are listed in the statutory scheme to be utilized, will lead to the execution of a mentally retarded defendant - Freddie Lee Hall. His execution would be cruel and unusual. This Court should grant the writ and vacate Mr. Hall's death sentence.

ERIC C. PINKARD
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Date: June 6, 2013

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

FREDDIE LEE HALL-PETITIONER
vs.

MICHAEL D. CREWS, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS

AND

PAMELA JO BONDI, ATTORNEY GENERAL,
STATE OF FLORIDA

PROOF OF SERVICE

I, Eric C. Pinkard, do swear or declare that on this date, the 6th day of June 2013, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid. The names and addresses of those served are as follows:

Kenneth S. Nunnelley
Assistant Attorney General
444 Seabreeze Blvd.
5th Floor
Daytona Beach, Florida 32118

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 6th day of June 2013.

Eric C Pinkard
Assistant CCRC-M
Fla. Bar No.651443

No. _____

CAPITAL CASE

IN THE
SUPREME COURT OF THE UNITED STATES

FREDDIE LEE HALL,
Petitioner,

versus,

MICHAEL D. CREWS,
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS
and
PAMELA JO BONDI,
ATTORNEY GENERAL, STATE OF FLORIDA
Respondents.

APPENDICES
A-F

VOLUME 1 OF 1

APPENDIX A

Warning
As of: Jun 04, 2013

FREDDIE LEE HALL, Appellant, v. STATE OF FLORIDA, Appellee

No. 54561

Supreme Court of Florida

403 So. 2d 1321; 1981 Fla. LEXIS 2790

July 16, 1981

PRIOR HISTORY: [**1] An Appeal from the Circuit Court in and for Putnam County, John W. Booth, Judge - Case Nos. 78-260 (Lake); 58-52 (Sumter); and 78-315 (Putnam).

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant challenged a judgment from the Circuit Court, Putnam County (Florida), where he was convicted of first degree murder and sentenced to death. Appellant claimed that the state failed to prove him guilty of first degree murder and that the trial court erred in applying aggravating factors at sentencing.

OVERVIEW: Appellant was convicted of first degree murder and sentenced to death. The Florida Supreme Court affirmed his conviction and sentencing. The court held that appellant and an accomplice did everything together. Circumstances were sufficient to convince the jury that the criminal acts were the result of a common scheme and supported the jury's conclusion that, even if appellant did not pull the trigger, he was a principal to the crime of murder. An aider and abettor was responsible for all acts committed by his accomplice in furtherance of the criminal scheme under *Fla. Stat. ch. 777.011* (1977). There was sufficient evidence to sustain appellant's conviction. The trial court properly found three aggravating factors beyond a reasonable doubt: appellant previously had been convicted of another capital crime or of a felony involving the threat of violence to some person; the murder was committed during the commission of kidnapping and robbery; and the murder was especially heinous, atrocious, or cruel. These findings, coupled with the lack of mitigating circumstances, warranted the trial judge's imposition of the death penalty.

OUTCOME: The state supreme court affirmed appellant's conviction of murder and his sentence of death because the trial evidence proved beyond a reasonable doubt that he was, at the least, a principal to the crime of murder as an aider and abettor. An aider and abettor was responsible for all acts committed by his accomplice in furtherance of the criminal scheme. The trial court properly found aggravating factors beyond a reasonable doubt.

LexisNexis(R) Headnotes

Criminal Law & Procedure > Accessories > Aiding & Abetting
[HN1] See *Fla. Stat. ch. 777.011* (1977).

Criminal Law & Procedure > Accessories > Aiding & Abetting
[HN2] An aider and abettor is responsible for all acts committed by his accomplice in furtherance of the criminal scheme.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Remain Silent > Prosecutor's Comments on Defendant's Silence
Criminal Law & Procedure > Appeals > Reversible Errors > General Overview

[HN3] It is reversible error for the state to comment on the defendant's failure to testify.

Criminal Law & Procedure > Arrests > Miranda Warnings
Criminal Law & Procedure > Interrogation > Miranda Rights > Notice & Warning
Legal Ethics > Prosecutorial Conduct
[HN4] While a prosecutor may not elicit from a witness the fact that the accused chose not to make a statement, it is not improper to elicit testimony that Miranda warnings were given to the accused. Such testimony is relevant to prove that a subsequent statement was made voluntarily.

COUNSEL: Morton D. Aulls and H. D. Robuck, Jr., Tavares, for appellant.

Jim Smith, Atty. Gen., and Robert J. Landry, Asst. Atty. Gen., Tampa, for appellee.

JUDGES: SUNDBERG, C.J., ADKINS, BOYD, OVERTON, ENGLAND, ALDERMAN and McDONALD, JJ., Concur.

OPINION BY: PER CURIAM

OPINION

[*1322] PER CURIAM.

Hall was convicted of first-degree murder and sentenced to death. We find no reversible error and affirm.

[*1323] Hall and Mack Ruffin were indicted for the murders of Karol Hurst and Deputy Sheriff Lonnie Coburn. Hall was tried alone for the Hurst murder, which is the subject of this appeal. [1]

1 Ruffin, tried separately for the Hurst murder, was convicted and received a death sentence. This Court affirmed. *Ruffin v. State, 397 So.2d 277 (Fla. 1980)*. Tried together, Hall and Ruffin were convicted of murdering Deputy Coburn. Ruffin received a sentence of life imprisonment while Hall received another death sentence. *Hall v. State, 403 So.2d 1319 (Fla. 1980)*. Of course, our review of the present case is limited to the record presented in the instant case.

[**2] On February 21, 1978, Mrs. Hurst, a 21-year-old housewife who was seven months pregnant, left a Pantry Pride checkout counter in Leesburg, Florida, at 3:00 p.m. Her body was found at 3:00 p.m. on February 22, 1978, in Sumter County. She had been shot and sexually assaulted. In custody on the morning of February 22 for Deputy Coburn's death, Hall told a deputy sheriff how, on the previous day, he and Ruffin had sat in that Pantry Pride parking lot looking for a car to use in committing a robbery when he, Hall, accosted Mrs. Hurst and forced her into her car. Hall slid in behind the steering wheel and drove while Ruffin followed in his own car. They stopped in a wooded area where, according to Hall, Ruffin beat, sexually assaulted, and shot Mrs. Hurst.

At trial the evidence established that, after leaving the wooded area, the pair was seen at a convenience store in Hernando County. Their conduct in the store aroused suspicions and the clerk called the sheriff's office. Before a deputy arrived, Hall and Ruffin left the store. Shortly after their departure the clerk heard a shot and found Deputy Coburn dead on the ground behind the store. Coburn's weapon was missing, but under [**3] his body lay the weapon later shown to have killed Mrs. Hurst. Hall and Ruffin fled in the Hurst vehicle, which they had driven to the store, but, after a chase, they abandoned the car and fled on foot. Both men were caught shortly thereafter. They left Coburn's pistol, Mrs. Hurst's handbag, and groceries which she had bought that afternoon in the car.

Hall contends that the state has failed to prove him guilty of first-degree murder. The state presented the case to the jury on the theory that Hall and Ruffin did everything together. They planned the robbery together and drove together to the Pantry Pride parking lot to obtain a car. Hall drove the Hurst car to the wooded area while Ruffin followed in his own car. The two were together at the site of Mrs. Hurst's assault and death, at the convenience store where their actions drew suspicions, and when they fled in the stolen car. These circumstances were sufficient to convince the jury that the criminal acts were the result of a common scheme.

These facts support the jury's conclusion that, even if Hall did not pull the trigger, he was a principal to the crime of murder. [HN1] *Section 777.011, Florida Statutes* (1977), states that

[**4]

> [w]hoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be

> committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he is or is not actually or constructively present at the commission of such offense.

[HN2] An aider and abettor is responsible for all acts committed by his accomplice in furtherance of the criminal scheme. *Farworth v. State, 267 So.2d 647 (Fla. 1972), cert. denied, 411 U.S. 987, 93 S. Ct. 2276, 36 L. Ed. 2d 965 (1973); Pope v. State, 84 Fla. 428, 94 So. 865 (1922).* The evidence in this case shows that either Hall or Ruffin killed Mrs. Hurst. It also demonstrates that the other was an aider and abettor. There is sufficient evidence to sustain Hall's conviction.

Hall next contends that the trial judge should have granted a mistrial because the prosecutor made inflammatory remarks to the jury and commented on Hall's refusal to testify. [HN3] It is reversible error for the state to comment on the defendant's failure to testify, *Doyle v. Ohio,* [*1324] [**5] *426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976); Clark v. State, 363 So.2d 331 (Fla. 1978),* but the prosecutor did not do so in the instant case. The state did comment (referring to the defendant), "and he's asleep." This was not a comment on Hall's failure to testify. While this remark may have improperly implied a lack of interest on the part of the defendant in his own trial proceedings, it was not so prejudicial that a mistrial was required. We have reviewed the other remarks complained of and find no reversible error.

Hall also complains that a state witness improperly testified that Hall exercised his right to remain silent after being given his *Miranda* [2] warning. [3] We interpret that witness's testimony differently and find that he made no improper comment. [HN4] While a prosecutor may not elicit from a witness the fact that the accused chose not to make a statement, it is not improper to elicit testimony that *Miranda* warnings were given to the accused. *See Holland v. State, 340 So.2d 931 (Fla. 4th DCA 1976).* Such testimony is relevant to prove that a subsequent statement was made voluntarily.

2 *384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).*

[**6]

3 The state's witness, Detective White, testified as follows:

> Q What did you do then?
>
> A Okay, Trooper Peters handed me his handcuffs and while (Hall) was on the ground I approached him from the rear and cuffed his hands behind his back. And at that time I bent him over, he was still on his knees with his feet on the ground, and I bent him over at the waist, and stood over him and advised him of his rights.
>
> Q When you advised him of his rights, will you tell the ladies and gentlemen of the jury, please, what you told him at that time?
>
> A I told him that he had the right to remain silent, that anything he said could and would be used against him in a court of law. I told him he had the right to an attorney if he wished one, and that if he could not afford one, the court would appoint one for him.
>
> Q All right. Did he do anything to indicate whether or not he understood what you were saying to him?
>
> A He said he did, or he indicated that he did.
>
> Q In what way did he indicate he understood?
>
> A I don't recall; he said, "Yeah," or something like that.
>
> Q All right. Will you describe, please, the lighting and weather conditions at the time?
>
> A It was fairly chilly. It was pretty cold. It was clear, it wasn't raining. The only light that I recall having at the time was the light from the Lykes-Pasco Packing Company.
>
> Q How was the person dressed?
>
> A He had on a pair of dark checked slacks, and no shirt and

no shoes.

[**7] Hall's last attack on his conviction is that evidence of the Coburn murder should not have been admitted. He contends that the testimony about Coburn's death was not necessary to the state's case and that the Coburn murder became the feature of the trial. As we did in the case of his cohort, Mack Ruffin, we find that the collateral crime evidence did not become a feature of this trial and that to be admissible the collateral crime evidence need not be necessary to the state's case. *See Ruffin v. State, 397 So.2d 277 (Fla. 1980).* As in *Ruffin*, the instant collateral crime evidence was admissible to prove identity (the Hurst murder weapon was found under Coburn's body) and to show the general context in which the criminal action occurred. *See Smith v. State, 365 So.2d 704 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S. Ct. 177, 62 L. Ed. 2d 115 (1979).*

Hall challenges his death sentence by claiming that the trial court failed to consider that he was under the influence of drugs at the time of the murder, that the prosecutor made improper remarks during the sentencing argument, [4] and that the evidence against Hall was not conclusive. As to the first point, Hall refers to his own [**8] testimony:

> A (Hall) I was high when this taken place, I wasn't drunk, I was high, and I'm sorry to say I really didn't want no one to get killed in this case, but it happened this way. I'm sorry it happened that way.
>
> [*1325] A That's right. All right, also, if I had been ... I was high, like I said, they had it in the paper, we had been smoking some dope and drunk some beer and bought a pint of brandy.
>
> Q So you had been smoking dope?
>
> A Right, that night.
>
> Q What kind of dope were you smoking?
>
> A Some kind of pot, grass.
>
> Q And some pills, what kind of pills were you taking?
>
> A I got some the pills from Ruffin.

Hall says that this testimony shows mitigating factors of diminished capacity to appreciate the criminality of his conduct and influence of extreme emotional disturbance. *See* § 921.141(6)(b) and (f), Fla.Stat. (1977). Hall, however, never argued those mitigating factors to the trial court. Even if he [**9] had, the trial court could have reasonably found that this testimony did not establish those mitigating factors.

4 None of the prosecutor's remarks were objected to at the time.

The trial court properly found three aggravating factors beyond a reasonable doubt: the defendant previously had been convicted of another capital crime or of a felony involving the threat of violence to some person; the murder was committed during the commission of kidnapping and robbery; and the murder was especially heinous, atrocious, or cruel. These findings, coupled with the lack of mitigating circumstances, warranted the trial judge's imposition of the death penalty.

We affirm Hall's conviction and death sentence.

It is so ordered.

SUNDBERG, C. J., and ADKINS, BOYD, OVERTON, ENGLAND, ALDERMAN and McDONALD, JJ., concur.

APPENDIX B

614 So. 2d 473, *; 1993 Fla. LEXIS 14, **;
20 A.L.R.5th 923; 18 Fla. L. Weekly S 63

Caution
As of: Jun 04, 2013

FREDDIE LEE HALL, Appellant, v. STATE OF FLORIDA, Appellee.

No. 77,563

SUPREME COURT OF FLORIDA

614 So. 2d 473; 1993 Fla. LEXIS 14; 20 A.L.R.5th 923; 18 Fla. L. Weekly S 63

January 14, 1993, Decided

SUBSEQUENT HISTORY: [**1] Rehearing Denied March 22, 1993. Released for Publication March 22, 1993.

PRIOR HISTORY: An Appeal from the Circuit Court in and for Sumter County, Richard Tombrink, Jr., Judge - Case No. 78-52-CF

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant sought review of the judgment of the Circuit Court in and for Sumter County (Florida) that imposed a death sentence upon appellant after appellant was convicted of first degree murder and second degree murder.

OVERVIEW: Appellant was convicted of first degree murder for the murder of a pregnant woman and a deputy sheriff. Subsequently, the conviction for the deputy's murder was reduced to second degree murder. Appellant sought review of the death sentence that was imposed during resentencing. The court affirmed, holding that appellant failed to show that there was an abuse of discretion in the refusal to grant appellant more peremptory challenges during the trial, in the refusal to grant appellant's proposed jury instruction, and in excluding cumulative testimony. Furthermore, the court held that the proper standard was used in weighing the aggravating and mitigating factors and that the evidence supported the conclusion that the crime of the pregnant woman was committed in a cold, calculated, and premeditated manner with no pretense of moral or legal justification. In addition, the jury instruction on the heinous, atrocious, or cruel aggravator was not unconstitutionally vague because the terms were sufficiently defined. Finally, the court held that the sentence was not disproportionate because aggravators outweighed mitigating factors and the death penalty was properly imposed for the crime.

OUTCOME: The court affirmed the death sentence that was imposed upon appellant, during resentencing, after appellant was convicted of first degree murder and second degree murder because the trial court properly considered the aggravating and mitigating factors, the sentence was not disproportionate, and the trial court did not abuse its discretion during resentencing.

LexisNexis(R) Headnotes

Criminal Law & Procedure > Juries & Jurors > Peremptory Challenges > General Overview
Criminal Law & Procedure > Appeals > Reversible Errors > General Overview
[HN1] To show reversible error, a defendant must show that all peremptories have been exhausted and that an objectionable juror had to be accepted.

Criminal Law & Procedure > Juries & Jurors > Disqualification & Removal of Jurors > General Overview
Criminal Law & Procedure > Juries & Jurors > Peremptory Challenges > Appellate Review
Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > General Overview
[HN2] The competency of a challenged juror is a mixed

question of law and fact, the resolution of which is within a trial court's discretion.

Criminal Law & Procedure > Jury Instructions > Particular Instructions > General Overview
[HN3] Jury instructions must relate to issues concerning evidence received at trial. Confusing, contradictory, or misleading instructions should not be given.

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General Overview
Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor
[HN4] The admitting of evidence is within a trial court's discretion.

Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor
[HN5] It is within a trial court's discretion to exclude cumulative evidence.

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances
Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances
Governments > Courts > Judges
[HN6] Notwithstanding a jury recommendation, a judge is required to make an independent determination based on aggravating and mitigating factors.

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Resisting Arrest > General Overview
Criminal Law & Procedure > Sentencing > Appeals > General Overview
Criminal Law & Procedure > Sentencing > Resentencing
[HN7] Because a resentencing is a totally new proceeding, a resentencing court is not bound by the original court's findings.

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances
Evidence > Procedural Considerations > Circumstantial & Direct Evidence
[HN8] When a victim is not a law enforcement officer, eliminating a witness must be the dominant motive for the murder to support finding the avoid, prevent arrest aggravator. Circumstantial evidence can be used to prove this aggravator, and the Supreme Court of Florida uniformly upholds finding this aggravator when the victim is transported to another location and then killed.

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances
[HN9] In considering allegedly mitigating evidence, a court must decide if the facts alleged in mitigation are supported by the evidence, if those established facts are capable of mitigating defendant's punishments, that is, may they be considered as extenuating or reducing the degree of moral culpability for the crime committed, and if they are of sufficient weight to counterbalance the aggravating factors. The decision as to whether a mitigating circumstance has been established is within a trial court's discretion.

COUNSEL: James B. Gibson, Public Defender and Larry B. Henderson, Assistant Public Defender, Seventh Judicial Circuit, Daytona Beach, Florida, for Appellant.

Robert A. Butterworth, Attorney General and Robert J. Landry, Assistant Attorney General, Tampa, Florida, for Appellee.

JUDGES: OVERTON, McDONALD, SHAW, GRIMES and HARDING, JJ., concur. BARKETT, C.J., dissents with an opinion, in which KOGAN, J., concurs.

OPINION BY: PER CURIAM

OPINION

[*475] PER CURIAM.

Freddie Lee Hall appeals the sentence of death imposed on him on resentencing. We have jurisdiction pursuant to *article V, section 3(b)(1), Florida Constitution*, and affirm Hall's sentence.

In February 1978 Hall and Mack Ruffin decided to steal a car to use in a robbery. Spotting a twenty-one-year-old housewife, who was seven months pregnant, in a grocery store parking lot, Hall forced her into her car and drove that car to a secluded wooded area. Ruffin followed in his car. After reaching their destination, both men raped the victim, after which she was beaten and shot and her [**2] body dragged further into the woods. Later that day, they drove the victim's car to a convenience store where they killed a deputy sheriff. The handgun shown to have killed the female victim was found under the deputy's body.

In separate trials their juries convicted both Hall and

Ruffin of first-degree murder and recommended that they be sentenced to death, which their trial judges did. [1] This Court affirmed Hall's conviction and sentence. *Hall v. State, 403 So. 2d 1321 (Fla. 1981).* Later, however, this Court ordered that Hall be resentenced because of error under *Hitchcock v. Dugger, 481 U.S. 393, 95 L. Ed. 2d 347, 107 S. Ct. 1821 (1987). Hall v. State, 541 So. 2d 1125 (Fla. 1989).*

1 We affirmed Ruffin's conviction and sentence. *Ruffin v. State, 397 So. 2d 277* (Fla.), *cert. denied, 454 U.S. 882, 70 L. Ed. 2d 194, 102 S. Ct. 368 (1981).* A federal court granted Ruffin a resentencing based on *Hitchcock v. Dugger, 481 U.S. 393, 95 L. Ed. 2d 347, 107 S. Ct. 1821 (1987). Ruffin v. Dugger, 848 F.2d 1512* (11th Cir. (1988), *cert. denied, 488 U.S. 1044, 102 L. Ed. 2d 995, 109 S. Ct. 872 (1989).* At resentencing Ruffin's jury recommended life imprisonment, which the trial court imposed. *Ruffin v. State, 589 So. 2d 403 (Fla. 5th DCA 1991).*

[**3] At the resentencing the state produced witnesses and prior testimony to make the jury aware of the underlying facts and to prove aggravators. Hall presented numerous witnesses, including, among others, his original trial and appellate attorneys, two sisters, two brothers, three other family members and acquaintances, a professor of special education, a psychiatrist, a psychologist, and a criminologist in his attempt to establish mitigators. The jury, however, recommended that he be sentenced to death, which the trial court did.

Each side started voir dire with ten peremptory challenges, and, Hall eventually used his last peremptory to remove a prospective juror that the court refused to remove for cause. Claiming that there was one more person on the panel that he would excuse, Hall asked for more challenges. The court said that the last person Hall challenged was at least arguable as to removal for cause and gave him one more challenge, which Hall used. After the state struck another prospective juror, Hall [*476] asked for still more challenges because he did not want Cavanaugh, the last person called to the panel, on the jury. The state objected that granting more challenges in [**4] a piecemeal fashion was unfair to the state, and the court refused any more challenges. Hall did not challenge Cavanaugh for cause, but moved for a mistrial because the court refused to give him more challenges. He had no authority to cite for this claim, and the state argued that granting more challenges was within the court's discretion. The court agreed and denied the motion. Now, Hall argues that because Cavanaugh had been exposed to prejudicial publicity and juror misbehavior the court erred in refusing him an additional peremptory challenge. We disagree.

[HN1] "To show reversible error, a defendant must show that all peremptories had been exhausted and that an objectionable juror had to be accepted." *Pentecost v. State, 545 So. 2d 861, 863 n.1 (Fla. 1989); Trotter v. State, 576 So. 2d 691 (Fla. 1990).* Although Hall claimed that he would have excused Cavanaugh, the record discloses that, even though Cavanaugh had seen a newspaper headline about Hall's resentencing, he did not read the article and that Cavanaugh did not hear what some jurors were talking about in the hallway. We have previously held that [HN2] the competency [**5] of a challenged juror is a mixed question of law and fact, the resolution of which is within the trial court's discretion. *Singer v. State, 109 So. 2d 7 (Fla. 1959).* Hall has shown no abuse of discretion in the trial court's refusal to grant him more peremptory challenges and there is no merit to this issue.

Hall filed a lengthy proposed instruction to explain why he was being resentenced. The state objected that the explanation was irrelevant and confusing, and the court refused to give the proposed instruction. [HN3] "Jury instructions must relate to issues concerning evidence received at trial", and confusing, contradictory, or misleading instructions should not be given. *Butler v. State, 493 So. 2d 451, 452 (Fla. 1986).* Hall has shown no abuse of discretion in the court's refusal to give the proposed instruction, and this issue has no merit.

The state tried Hall and Ruffin together for the deputy's murder. The jury convicted each of first-degree murder and recommended that Ruffin be sentenced to life imprisonment and that Hall be sentenced to death, and the trial court agreed with those recommendations. On appeal the [**6] district court affirmed Ruffin's conviction of first-degree murder. *Ruffin v. State, 390 So. 2d 841 (Fla. 5th DCA 1980).* In considering Hall's appeal of his conviction and death sentence, however, this Court vacated the sentence and reduced Hall's conviction to second-degree murder because, although both Hall and Ruffin were guilty of murder, premeditated, first-degree murder had not been proved. *Hall v. State, 403 So. 2d 1319 (Fla. 1981).*

At resentencing Hall sought to introduce Ruffin's conviction of first-degree murder, to contrast with his own second-degree murder conviction. The state objected and argued that if this were allowed it should be allowed to explain the differences in the codefendants' convictions. The judge held that he would allow both sides to argue the significance of Ruffin's conviction, and Hall decided not to introduce that conviction. Now, Hall argues that the court erred in refusing to let him introduce

the conviction without the state being able to explain it.

We find no merit to Hall's argument. If Ruffin's conviction for murdering the deputy had come to this Court, no doubt it, as well [**7] as Hall's, would have been reduced to second-degree murder. *See Moreland v. State, 582 So. 2d 618 (Fla. 1991).* [HN4] The admitting of evidence is within the trial court's discretion. *Blanco v. State, 452 So. 2d 520 (Fla. 1984), cert. denied, 469 U.S. 1181, 83 L. Ed. 2d 953, 105 S. Ct. 940 (1985).* Hall has demonstrated no abuse of discretion in the trial court's ruling that the state would be able to explain Ruffin's conviction.

As stated earlier, seven of Hall's relatives and friends testified on his behalf. When he sought to introduce testimony [*477] from four other relatives, the state objected to their testimony as being cumulative, repetitious, and redundant. The parties then stipulated that the jury would be told that these witnesses "would have testified to the same factual circumstances that other family witnesses have testified to." [HN5] It is within the trial court's discretion to exclude cumulative evidence. *Muehleman v. State, 503 So. 2d 310* (Fla.), *cert. denied, 484 U.S. 882, 98 L. Ed. 2d 170, 108 S. Ct. 39 (1987).* Hall has shown no abuse of discretion, and there is no merit to his argument that the [**8] court erred in excluding this testimony.

As noted earlier, Hall's jury recommended that he be sentenced to death. In agreeing with that recommendation the court wrote: "It is only in rare circumstances that this court could impose a sentence other than what is recommended by the jury, although the court obviously has the right, in appropriate circumstances, to exercise its prerogative of judicial override." Hall now argues that the "rare circumstances" language shows that the court used the wrong standard in considering the jury's recommendation. We disagree. As we have stated previously: [HN6] "Notwithstanding the jury recommendation . . . the judge is required to make an independent determination, based on the aggravating and mitigating factors." *Grossman v. State, 525 So. 2d 833, 840 (Fla. 1988), cert. denied, 489 U.S. 1071, 103 L. Ed. 2d 822, 109 S. Ct. 1354 (1989).* This judge recognized that the final decision as to penalty was his and conscientiously weighed and discussed the aggravating and mitigating evidence and made his decision based on the evidence. We are convinced that he applied the proper standard.

In sentencing Hall to death the court found [**9] that seven aggravators had been established: 1) previous conviction of violent felony (assault with intent to commit rape, second-degree murder, shooting at or into an occupied vehicle); 2) under sentence of imprisonment (on parole for the assault conviction); 3) committed during the commission of kidnapping and sexual battery; 4) committed for pecuniary gain (stealing the victim's car); 5) heinous, atrocious, or cruel; 6) cold, calculated, and premeditated; and 7) committed to avoid or prevent arrest. Because his original sentencing judge found only three aggravators, Hall now argues that the resentencing court could not find the additional four. We recently considered this issue and, contrary to Hall's argument, held that, [HN7] because a resentencing is a totally new proceeding, the resentencing court is not bound by the original court's findings. *Preston v. State, 607 So. 2d 404, 1992 Fla. LEXIS 1823, 17 Fla. Law W. S 669 (Fla. 1992).* Thus, there is no merit to Hall's argument.

Hall also argues that the state did not prove the avoid, prevent arrest and cold, calculated, and premeditated aggravators. [2] We disagree. We have long held that, [HN8] when the victim is not a law enforcement officer, eliminating a witness must [**10] be the dominant motive for the murder to support finding the avoid, prevent arrest aggravator. *E.g., Bates v. State, 465 So. 2d 490 (Fla. 1985).* Circumstantial evidence can be used to prove this aggravator, and we have uniformly upheld finding this aggravator when the victim is transported to another location and then killed. *E.g., Preston; Swafford v. State, 533 So. 2d 270 (Fla. 1988), cert. denied, 489 U.S. 1100, 103 L. Ed. 2d 944, 109 S. Ct. 1578 (1989); Engle v. State, 510 So. 2d 881 (Fla. 1987), cert. denied, 485 U.S. 924, 99 L. Ed. 2d 256, 108 S. Ct. 1094 (1988); Cave v. State, 476 So. 2d 180 (Fla. 1985), cert. denied, 476 U.S. 1178, 90 L. Ed. 2d 993, 106 S. Ct. 2907 (1986); Copeland v. State, 457 So. 2d 1012 (Fla. 1984), cert. denied, 471 U.S. 1030, 85 L. Ed. 2d 324, 105 S. Ct. 2051 (1985); Card v State, 453 So. 2d 17* (Fla.), *cert. denied, 469 U.S. 989, 83 L. Ed. 2d 330, 105 S. Ct. 396 (1984); Martin v. State, 420 So. 2d 583 (Fla. 1982), cert. denied, 460 U.S. 1056, 75 L. Ed. 2d 937, 103 S. Ct. 1508 (1983).* [**11] Here, the evidence leaves no reasonable inference except that Hall and Ruffin killed the victim to eliminate the only witness to their having kidnapped [*478] and raped her and having stolen her car. [3]

2 Hall does not challenge the applicability of the five other aggravators, and our review of the record shows them to have been established beyond a reasonable doubt.

3 Even if we were to hold that this aggravator should not have been found, given the strong remaining aggravators, any error would be harmless.

The evidence also supports finding the murder to have been in a cold, calculated, and premeditated manner

with no pretense of moral or legal justification. The record shows that Hall and Ruffin intended to steal the victim's car. To that end, they could have taken the car and simply left her in the parking lot. Instead, however, they abducted, raped, beat, and finally killed her. Even if Hall did not fire the shot that killed the victim, he was a willing if not predominant participant in the other acts. [**12] *Copeland; Cave.* The totality of the circumstances show this murder to have been committed in a cold, calculated, and premeditated manner. There is no merit to Hall's argument that his mental retardation provided a pretense of moral or legal justification. *Cf. Jones v. State, 612 So. 2d 1370, 1992 Fla. LEXIS 2100, 18 Fla. Law W. S 11 (Fla. 1992)* (sense of rejection does not provide a valid pretense); *Williamson v. State, 511 So. 2d 289 (Fla. 1987)* (no pretense of justification where victim had not threatened defendant), *cert. denied, 485 U.S. 929, 99 L. Ed. 2d 261, 108 S. Ct. 1098 (1988).* Additionally, it is not improper to apply this aggravator to killings committed before the legislature adopted it. *Sireci v. State, 587 So. 2d 450 (Fla. 1991), cert. denied, 117 L. Ed. 2d 639, 112 S. Ct. 1500 (1992).*

We also find no merit to Hall's contention that the heinous, atrocious, or cruel aggravator is unconstitutionally vague.[4] In *Espinosa v. Florida, 120 L. Ed. 2d 854, 112 S. Ct. 2926 (1992)*, the United States Supreme Court declared our former instruction[5] on this aggravator invalid. Hall's trial judge, however, gave his jury the [**13] new instruction as follows:

Six, the crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel. Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means that designed to inflict a high degree of pain with utter indifference to, or even enjoyment of the suffering of others. The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

4 We have previously rejected Hall's constitutional claims or claims very similar to them. E.g., *Ragsdale v. State, 609 So. 2d 10, 1992 Fla. LEXIS 1799, 17 Fla. Law W. S 620 (Fla. 1992); Sireci v. State, 587 So. 2d 450 (Fla. 1991), cert. denied, 117 L. Ed. 2d 639, 112 S. Ct. 1500 (1992); Jones v. State, 569 So. 2d 1234 (Fla. 1990); Hitchcock v. State, 578 So. 2d 685 (Fla. 1990), vacated on other grounds, 112 S. Ct. 3020 (1992); Eutzy v. State, 541 So. 2d 1143, 120 L. Ed. 2d 892 (Fla. 1989).*

[**14]

5 Formerly, the instructions listed this aggravator as "especially wicked, evil, atrocious or cruel" without defining any of those terms.

This instruction defines the terms sufficiently to save both the instruction and the aggravator from vagueness challenges.

Hall also attacks the trial judge's findings in regards to the mitigating evidence. We disagree that the judge committed reversible error or that death is disproportionate for this killing. The judge considered four statutory mitigators and more than twenty items of nonstatutory mitigating evidence grouped into three general areas, i.e., mental, emotional, and learning disabilities; abused and deprived childhood; and disparate treatment of co-perpetrator. Although the judge initially stated that some of the mitigating evidence was "unquantifiable," he later spent almost six pages analyzing the mitigating evidence and concluded that whatever mitigators had been established did not outweigh the aggravators.

[HN9] In considering allegedly mitigating evidence the court must decide if "the facts alleged in mitigation are supported by the evidence," [**15] if those established facts are "capable of mitigating the defendant's punishments i.e., . . . may be considered as extenuating or reducing the degree of moral culpability for the crime [*479] committed", and if "they are of sufficient weight to counterbalance the aggravating factors." *Rogers v. State, 511 So. 2d 526, 534 (Fla. 1987), cert. denied, 484 U.S. 1020, 98 L. Ed. 2d 681, 108 S. Ct. 733 (1988); Campbell v. State, 571 So. 2d 415 (Fla. 1990).* "The decision as to whether a mitigating circumstance has been established is within the trial court's discretion." *Preston,* slip op. at 16. The judge carefully and conscientiously applied the *Rogers* standard and resolved the conflicts in the evidence, as was his responsibility *Gunsby v. State, 574 So. 2d 1085* (Fla.), *cert. denied, 116 L. Ed. 2d 103, 112 S. Ct. 136 (1991).* The record supports his conclusion that the mitigators either had not been established or were entitled to little weight. *Preston; Ponticelli v. State, 593 So. 2d 483 (Fla. 1991), vacated on other grounds, 113 S. Ct. 32, 121 L. Ed. 2d 5 (1992).* [**16]

We also reject Hall's claim that his death sentence is not proportionate. These crimes were a joint operation, with each defendant responsible for the other's acts. *James v. State, 453 So. 2d 786* (Fla.), *cert. denied, 469 U.S. 1098, 83 L. Ed. 2d 717, 105 S. Ct. 608 (1984).* Even though Ruffin received a life sentence, the different treatment given Hall is appropriate. As noted by the trial judge, Hall was bigger and older than Ruffin and was the

leader. Before the date of this crime he had been convicted of a violent crime and was on parole, whereas Ruffin had no such criminal history. Also, Ruffin's resentencing jury recommended that he be sentenced to life imprisonment. Hall, on the other hand, has received a death recommendation from every jury he has appeared before. The disparate treatment is fully warranted. [6] The aggravators clearly outweigh the mitigating evidence, and this cruel, cold-blooded murder clearly falls within the class of killings for which the death penalty is properly imposed. *E.g., Swafford* (victim abducted, raped, and killed); *Engle* (same); *Cave* (co-perpetrators abducted, raped, and killed victim; defendant [**17] not actual killer); *Coland* (same).

6

Scott v. Dugger, 604 So. 2d 465 (Fla. 1992), is factually distinguishable and, therefore, no basis for relief.

Therefore, we affirm the death sentence imposed on Hall on resentencing.

It is so ordered.

OVERTON, McDONALD, SHAW, GRIMES and HARDING, JJ., concur. BARKETT, C.J., dissents with an opinion, in which KOGAN, J., concurs.

DISSENT BY: BARKETT

DISSENT

BARKETT, C.J., dissenting.

I cannot agree with the majority's conclusions regarding Freddie Lee Hall's sentence. Specifically, I cannot agree that "the record supports [the trial Judge's] conclusion that the mitigators either had not been established or were entitled to little weight." Majority op. at 11.

The testimony reflects that Hall has an IQ of 60; he suffers from organic brain damage, chronic psychosis, a speech impediment, and a learning disability; he is functionally illiterate; and he has a short-term memory equivalent to that of a first grader. The defense's four expert witnesses who testified regarding [**18] Hall's mental condition stated that his handicaps would have affected him at the time of the crime. As the trial judge noted in the resentencing order, Freddie Lee Hall was "raised under the most horrible family circumstances imaginable."

Indeed, the trial judge found that Hall had established substantial mitigation. The judge wrote that the evidence conclusively demonstrated that Hall "may have been suffering from mental and emotional disturbances and may have been, to some extent, unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." Additionally, the judge found that Hall suffers from organic brain damage, has been mentally retarded all of his life, suffers from mental illness, suffered tremendous emotional deprivation and disturbances throughout his life, suffered tremendous physical abuse and torture as a child, and has learning [*480] disabilities and a distinct speech impediment that adversely affected his development.

Hall's mental deficiency as an adult is not surprising. The sixteenth of seventeen children, Hall was tortured by his mother and abused by neighbors. Various relatives testified that Hall's mother tied him in a [**19] "croaker" sack, swung it over a fire, and beat him; buried him in the sand up to his neck to "strengthen his legs"; tied his hands to a rope that was attached to a ceiling beam and beat him while he was naked; locked him in a smokehouse for long intervals; and held a gun on Hall and his siblings while she poked them with sticks. Hall's mother withheld food from her children because she believed a famine was imminent, and she allowed neighbors to punish Hall by forcing him to stay underneath a bed for an entire day.

Hall's school records reflect his mental deficiencies. His teachers in the fourth, sixth, seventh, and eighth grades described him as mentally retarded. His fifth grade teacher stated that he was mentally maladjusted, and still another teacher wrote that "his mental maturity is far below his chronological age."

The U.S. Supreme Court has expressed the view that the Eighth Amendment does not categorically prohibit execution of the mentally retarded. *Penry v. Lynaugh, 492 U.S. 302, 340, 106 L. Ed. 2d 256, 109 S. Ct. 2934 (1989)*. Nonetheless, the Court noted in *Penry* that "evolving standards of decency that mark the progress of a maturing society may ultimately lead to a [**20] national consensus against executing the mentally retarded. *Id.*; *see Trop v. Dulles, 356 U.S. 86, 2 L. Ed. 2d 630, 78 S. Ct. 590 (1958)*. Since *Penry* was decided, Kentucky, Maryland, New Mexico, and Tennessee have passed legislation exempting mentally retarded people from the death penalty. *See* V. Stephen Cohen, Comment, *Exempting the Mentally Retarded from the Death Penalty: A Comment on Florida's Proposed Legislation 19 Fla. St. U. L. Rev. 457, 468 (1991)*. Additionally, the Georgia Supreme Court has found that execution of the mentally retarded violates its state constitutional provision against cruel and unusual punishment. *Fleming v. Zant, 259 Ga. 687, 386 S.E.2d 339 (Ga. 1989)*. The Georgia court wrote:

The "standard of decency" that is relevant to the interpretation of the prohibition against cruel and unusual punishment found in the Georgia Constitution is the standard of the people of Georgia, not the national standard. Federal constitutional standards represent the minimum, not the maximum, protection that this state must afford its citizens. Thus, although the rest of the nation might not agree, under the Georgia [**21] Constitution, the execution of the mentally retarded constitutes cruel and unusual punishment.

Id. at 342 (citation omitted). [7]

7 In determining its state standards of decency, the Georgia court relied in part on a prospective legislative enactment that was passed after the trial of the defendant. *Fleming v. Zant, 259 Ga. 687, 386 S.E.2d 339, 342 (Ga. 1989).* The Georgia statute was a response to public outrage over the 1986 execution of Jerome Bowden, a mentally retarded man with an IQ of 59. V. Stephen Cohen, Comment, *Exempting the Mentally Retarded from the Death Penalty: A Comment on Florida's Proposed Legislation, 19 Fla. St. U. L. Rev. 457, 468 n.117 (1991).*

Floridians' attitudes toward the mentally retarded have evolved significantly in recent decades. Those mentally retarded people committed to state care no longer are warehoused in "training centers," and a variety of procedural safeguards have been enacted to protect the [**22] rights of those committed to state facilities. *See § 393.11, Fla. Stat.* (1991) (regulating involuntary admission of the mentally retarded to state residential services); *see also* David A. Davis, *Executing the Mentally Retarded,* Fla. Bar. J., February 1991, at 13, 15 (discussing generally how statutes have changed to reflect a more enlightened approach to caring for the mentally retarded).

Society has developed a greater understanding of mental retardation. It is generally recognized now that mental retardation is a permanent learning disability that manifests itself in several predictable ways, including poor communication skills, short memory, short attention span, and [*481] immature or incomplete concepts of blameworthiness and causation. Davis, Fla. Bar J. at 13; *see also* James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants, 53 Geo. Wash. L. Rev. 414, 417 (1985);* John Blume & David Bruck, *Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis,* 41 Ark. L. Rev. 725, 732-34 (1988). A person who is mentally retarded is not just "slower" than the average person. Mental [**23] retardation is "a severe and permanent mental impairment that affects almost every aspect of a mentally retarded person's life." Blume & Bruck, 41 Ark. L. Rev. at 734.

It would appear that the trial judge did not understand the nature of mental retardation. Otherwise, he could not have reached the conclusion that the mitigating factors were entitled to little weight because he could not "definitely establish that they affected Hall at the time of the crime."

This Court has not addressed whether executing the mentally retarded is cruel or unusual punishment under *article I, section 17 of the Florida Constitution.* I believe it is appropriate to analyze whether imposition of capital punishment in such circumstances is either "cruel " or "unusual." [8] First, because a mentally retarded person such as Freddie Lee Hall has a lessened ability to determine right from wrong and to appreciate the consequences of his behavior, imposition of the death penalty is excessive in relation to the crime committed. *Coker v. Georgia 433 U.S. 584, 592, 53 L. Ed. 2d 982, 97 S. Ct. 2861 (1977).* As Justice Brennan noted in *Furman v. Georgia, 408 U.S. 238, 257, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972)* [**24] (Brennan, J., concurring), a punishment is excessive when it is unnecessary. An excessive punishment "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering." *Coker, 433 U.S. at 592* (discussing *Gregg v. Georgia, 428 U.S. 153, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976)).* I believe imposing the death penalty on mentally retarded defendants is excessive, serves no purpose except to dispose of those some might deem to be "unacceptable members" of society, and therefore, is "cruel."

8 Unlike the Eighth Amendment, which prohibits cruel *and* unusual punishment, article I, section 17 prohibits cruel *or* unusual punishment. The use of the disjunctive indicates that alternatives were intended. *Tillman v. State, 591 So. 2d 167, 168 n.2 (Fla. 1991).*

Second, executing a mentally retarded defendant such as Hall is "unusual" because it is disproportionate. Because [**25] mentally retarded individuals are not as culpable as other criminal defendants, I would find that the death penalty is always disproportionate when the defendant is proven to be retarded. However, even without a per se rule, Hall's mental retardation and his horrible childhood represent substantial mitigation, which makes the death penalty disproportionate despite the existence of several aggravating factors. *See, Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990); Smalley v. State, 546 So. 2d 720 (Fla. 1989); Blakely v. State, 561*

So. 2d 560 (Fla. 1990). This case is illustrative of far too many cases we see at this Court; horrible crimes are repeatedly committed by those who endure sickening abuse and deprivation as children. Many, like Freddie Lee Hall, are also mentally retarded and suffer particularly severe abuse because their parents do not understand the nature of retardation. The connection between an individual's childhood and his or her later ability to function as a productive member of society is obvious to those of us who routinely review criminal cases, and while a tragic [**26] childhood and mental retardation do not "excuse" later criminal behavior, they do reflect on an individual's culpability.

The law requires that the death penalty be reserved for the most heinous of crimes and the most culpable of murderers *See, e.g., Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989), State v. Dixon, 283 So. 2d 1, 8 (1973), cert. denied, 416 U.S. 943, 40 L. Ed. 2d 295, 94 S. Ct. 1951 (1974)*. The crime committed in this case undoubtedly was heinous. A young woman, seven months pregnant, was raped, beaten, and shot to death. The horrible nature of this crime is [*482] uncontroverted, and it is certainly among the types of offenses for which the death penalty may be imposed. However, Freddie Lee Hall is not among the most culpable of murderers. Hall's judgment, thought processes, and actions are unquestionably affected by his mental retardation. He cannot understand right from wrong in the way that most members of our society do, and while he should spend the rest of his life in prison, he should not be executed.

In evaluating both the "cruel" and "unusual" punishment prohibitions of article I, section 17 and [**27] the evolving standards of decency in Florida regarding the mentally retarded, I find that executing the mentally retarded violates the state constitution. Consequently, I would remand Hall's case for imposition of a sentence of life imprisonment.

KOGAN, J., concurs.

APPENDIX C

742 So. 2d 225, *; 1999 Fla. LEXIS 1137, **;
24 Fla. L. Weekly S 350

Analysis
As of: Jun 04, 2013

FREDDIE LEE HALL, Appellant, vs. STATE OF FLORIDA, Appellee.

No. 92,008

SUPREME COURT OF FLORIDA

742 So. 2d 225; 1999 Fla. LEXIS 1137; 24 Fla. L. Weekly S 350

July 1, 1999, Decided

PRIOR HISTORY: [**1] An Appeal from the Circuit Court in and for Sumter County, Richard Tombrink, Jr., Judge - Case No. 78-52-CF.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant sought review from the Circuit Court in and for Sumter County (Florida), which denied his *Fla. R. Crim. P. 3.850* motion after he was sentenced to death following conviction for abduction and murder.

OVERVIEW: Defendant was convicted of the abduction and murder of a young woman and was sentenced to death. After the trial court denied his *Fla. R. Crim. P. 3.850* motion, defendant sought review. On appeal, the record showed that mitigators either were not established or were entitled to little weight. The court affirmed the trial court's denial of the *Fla. R. Crim. P. 3.850* motion because the record reflected that competent, substantial evidence supported the trial court's conclusion that defendant was competent at the time of his resentencing. The court concluded that there was a full and fair evidentiary hearing as to defendant's competency claims in which the judge heard testimony from all relevant defense counsel and from four mental-health experts.

OUTCOME: The court affirmed the trial court's denial of the motion because the record reflected that competent, substantial evidence supported the trial court's conclusion that defendant was competent at the time of his resentencing.

LexisNexis(R) Headnotes

Civil Procedure > Judicial Officers > Judges > Discretion
Criminal Law & Procedure > Trials > Judicial Discretion
Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances
[HN1] In considering allegedly mitigating evidence the court must decide if the facts alleged in mitigation are supported by the evidence, if those established facts are capable of mitigating the defendant's punishment, i.e., may be considered as extenuating or reducing the degree of moral culpability for the crime committed, and if they are of sufficient weight to counterbalance the aggravating factors. The decision as to whether a mitigating circumstance has been established is within the trial court's discretion. The judge carefully and conscientiously applied the Rogers standard and resolved the conflicts in the evidence, as was his responsibility. The record supports his conclusion that the mitigators either had not been established or were entitled to little weight.

Criminal Law & Procedure > Trials > Examination of Witnesses
Criminal Law & Procedure > Sentencing > Resentencing
[HN2] It is the duty of the trial court to determine what weight should be given to conflicting testimony.

COUNSEL: Jack W. Crooks, Assistant Capital Collateral Regional Counsel, Tracy L. Martinell, Dayle M. Green, and Jeff Shama, Staff Attorneys, Capital Collateral Regional Counsel, Middle Region, Tampa, Florida, for Appellant.

Robert A. Butterworth, Attorney General, and Robert J. Landry, Assistant Attorney General, Tampa, Florida, for Appellee.

JUDGES: HARDING, C.J., and SHAW, WELLS, PARIENTE and LEWIS, JJ., concur. ANSTEAD, J., concurs specially with an opinion, in which PARIENTE, J., concurs. QUINCE, J., recused.

OPINION

[*225] PER CURIAM.

Freddie Lee Hall, a prisoner under sentence of death, appeals the trial court's order denying his motion for postconviction relief pursuant to *Florida Rule of Criminal Procedure 3.850*. We have jurisdiction. *Art. V, § 3(b)(1), Fla. Const.* We affirm the trial court's order for the reasons expressed herein.

Hall and an accomplice, Mack Ruffin, were convicted in separate trials of the February 1978 abduction and murder of a young woman. The facts of [**2] this crime are set forth in detail in our opinion on direct appeal. *See Hall v. State, 403 So. 2d 1321, 1323 (Fla. 1981)*. Both Hall and Ruffin were sentenced to die in the electric chair. This Court affirmed Hall's conviction and sentence. *Hall, 403 So. 2d at 1325*. In September 1982, Hall's first death warrant was signed. Hall filed a *rule 3.850* motion, and this Court affirmed the circuit court's denial of that motion and denied Hall's petition for a writ of habeas corpus. *Hall v. State, 420 So. 2d 872, 874 (Fla. 1982)*. A [*226] federal district court granted a temporary stay of execution but eventually denied relief. *Hall v. Wainwright, 565 F. Supp. 1222, 1244 (M.D. Fla. 1983)*. The Eleventh Circuit affirmed in part and reversed in part the district court's decision and remanded the case for an evidentiary hearing. *Hall v. Wainwright, 733 F.2d 766, 778 (11th Cir. 1984)*. The district court again denied relief, and the Eleventh Circuit affirmed. *Hall v. Wainwright, 805 F.2d 945, 948 (11th Cir. 1986)*. Hall then petitioned this Court for a writ of habeas corpus based on a claim that his sentencing proceeding violated *Hitchcock v. Dugger, 481 U.S. 393, 95 L. Ed. 2d* [**3] *347, 107 S. Ct. 1821 (1987)*. This Court held that any error in the sentencing proceeding was harmless. *Hall v. Dugger, 531 So. 2d 76 (Fla. 1988)*. Hall's second death warrant set execution for September 20, 1988. Hall filed his second *rule 3.850* motion, which the circuit court denied. On appeal, this Court considered additional non-record facts and ordered that Hall be resentenced because of a *Hitchcock* error in sentencing. *Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989)*. On resentencing, the jury recommended a death sentence, and the judge imposed it, finding seven aggravators and "unquantifiable" nonstatutory mitigation. *State v. Hall*, No. 78-52-CF (Fla. 5th Cir. Ct., Feb. 21, 1991) (Findings of Fact for Sentencing Order). This Court affirmed. *Hall v. State, 614 So. 2d 473 (Fla. 1993)*.

Hall filed the present *rule 3.850* motion to seek relief from this resentencing judgment, and it is the denial of that motion which is the subject of this appeal. The circuit court summarily denied all but one of Hall's thirty-three claims. The circuit court held an evidentiary hearing on August 25, 1997, as to Hall's claim that he was incompetent to proceed in the resentencing. [**4] Following the hearing, the trial court issued a sixty-five page order denying all relief. *State v. Hall*, No. 78-52-CF (Fla. 5th Cir. Ct., Oct. 31, 1997) (Final Order). Hall raises five claims in this appeal. [1]

1 Hall claims that: (1) the Florida capital sentencing statute is unconstitutional facially and as applied in allowing the death penalty for an incompetent or mentally retarded person; (2) Hall's resentencing was unconstitutional in that he is a mentally retarded person who was not competent to be resentenced; (3) execution by electrocution is cruel or unusual punishment or both under the Florida and United States Constitutions; (4) the trial court's summary denial of all but one issue raised in Hall's 3.850 motion violated Hall's rights to substantive and procedural due process; (5) fundamental error occurred in the trial court's finding that aggravators outweighed mitigators in the resentencing.

We find that Hall's first, third, and fifth claims are procedurally barred and that Hall fails to demonstrate [**5] any merit to his fourth claim. These four claims warrant only limited discussion. In his first claim, Hall argues that the Florida capital sentencing statute is unconstitutional facially and as applied in allowing the death penalty for an incompetent or mentally retarded person. This claim is procedurally barred because it was not raised on direct appeal. *See Remeta v. Dugger, 622 So. 2d 452, 455-56 (Fla. 1993)*. Issues that could have been raised on direct appeal but were not are noncognizable claims through collateral attack. *See Teffeteller v. State, 734 So. 2d 1009, 1999 Fla. LEXIS 259, 24 Fla. Law W. S 110* (Fla., 1999); *Johnson v. State,*

593 So. 2d 206 (Fla. 1992); *Smith v. State, 445 So. 2d 323 (Fla. 1983)*. Likewise, Hall's third claim, that execution by electrocution is cruel or unusual punishment or both under the Florida and United States Constitutions, is procedurally barred because it was not raised on direct appeal. *Teffeteller*; *Remeta*.

In his fifth claim, Hall contends that an error occurred in the trial court's finding that aggravators outweighed mitigators in the resentencing. The trial court correctly found this claim to be procedurally barred in that it was raised and addressed [**6] by this Court on direct appeal. *See* Final Order at 58. This Court held as follows in Hall's second direct appeal:

> [*227] Hall also attacks the trial judge's findings in regards to the mitigating evidence. We disagree that the judge committed reversible error or that death is disproportionate for this killing. The judge considered four statutory mitigators and more than twenty items of nonstatutory mitigating evidence grouped into three general areas, i.e., mental, emotional, and learning disabilities; abused and deprived childhood; and disparate treatment of co-perpetrator. Although the judge initially stated that some of the mitigating evidence was "unquantifiable," he later spent almost six pages analyzing the mitigating evidence and concluded that whatever mitigators had been established did not outweigh the aggravators.
>
> [HN1] In considering allegedly mitigating evidence the court must decide if "the facts alleged in mitigation are supported by the evidence," if those established facts are "capable of mitigating the defendant's punishment, i.e., . . . may be considered as extenuating or reducing the degree of moral culpability for the crime committed," and if "they are of sufficient weight [**7] to counterbalance the aggravating factors." *Rogers v. State, 511 So. 2d 526, 534 (Fla.1987), cert. denied, 484 U.S. 1020, 108 S. Ct. 733, 98 L. Ed. 2d 681 (1988)*; *Campbell v. State, 571 So. 2d 415 (Fla. 1990)*. "The decision as to whether a mitigating circumstance has been established is within the trial court's discretion." *Preston [v. State], 607 So. 2d 404, 412* [(Fla. 1992)]. The judge carefully and conscientiously applied the *Rogers* standard and resolved the conflicts in the evidence, as was his responsibility. The record supports his conclusion that the mitigators either had not been established or were entitled to little weight.

Hall, 614 So. 2d at 478-79 (citations omitted).

In his fourth claim, Hall contends that the circuit court's summary denial of all but one issue raised in Hall's 3.850 motion violated his rights to substantive and procedural due process. After reviewing all of the claims raised, the circuit judge stated in a sixty-five page postconviction order his rationale, based on the record, for denying relief on each claim, including the ineffective assistance of counsel claims. *See* Final Order. Hall provides no substantive [**8] basis for support of his claim that the circuit court's detailed order in respect to these claims was erroneous. We appreciate the circuit court's fully delineating its ruling on each issue. We reject Hall's fourth claim in this appeal as being plainly insufficient.

This brings us to Hall's remaining claim, in which he contends that the postconviction circuit court erred in finding him competent to proceed at resentencing. Hall argues that his resentencing was unconstitutional in that the effects of his mental retardation rendered him incompetent to be resentenced. Hall further contends that the court erred because it had an incomplete understanding of how mental retardation affects competency.

At the evidentiary hearing below, Hall presented the testimony of two of Hall's three resentencing counsel and four mental health experts. Hall also introduced into evidence copies of his medical records from the Department of Corrections between 1978 and 1996. Counsel Patricia Jenkins testified at the hearing that Hall was rational during resentencing but did not participate in planning trial strategy. Counsel Michael Johnson, who is now a circuit judge, testified that he consulted mental [**9] health experts for evaluations of Hall as to competency prior to the resentencing and that he would have asked for a competency hearing if he believed that any expert would support an incompetency finding.

Dr. Harry Krop, a psychologist, testified that he evaluated Hall twice as a confidential expert at the request of defense counsel in March and September 1990, prior to resentencing, and found him to have an IQ

of 73 and probable brain damage. Dr. [*228] Krop opined that neither finding necessarily reflected upon the issue of Hall's competency. He further testified that Hall was taking antidepressant medication at the time of resentencing and had a schizophrenic personality disorder but that Hall nevertheless understood the situation and was competent to proceed to resentencing. Dr. Jethro Toomer, a psychologist, testified that he had evaluated Hall in August 1988 as to potential mental health mitigation, but not as to competency, and found Hall's IQ to be sixty and his mental age to be thirteen. Dr. Toomer testified that he would find it unlikely that someone who is mentally retarded would meet the criteria for competency but that he was never asked to evaluate Hall as to competency at [**10] the time of resentencing and that he could not render such an opinion at the evidentiary hearing. Dr. Alfred Fireman, a psychiatrist, testified as to potential effects of prescription drugs but stated that he had never met or evaluated Hall and could not offer an opinion as to his competency. Dr. Mark Zimmerman, a psychologist, testified that he had evaluated Hall in 1995, at the request of defense counsel, and found that Hall's IQ was 74 and that he was mentally retarded and brain damaged but that Dr. Zimmerman was not asked to express an opinion as to competency. Dr. Zimmerman stated at the hearing that he believed Hall was incompetent at the time of his interview in 1995 but that he could not determine whether Hall was competent at resentencing in 1990.

The State introduced into evidence copies of Hall's inmate medical records from the Marion County Jail. The State also called as a witness Hall's additional resentencing defense counsel, Michael Graves, who testified that all of Hall's defense counsel had concerns during the resentencing as to Hall's competency but that Hall seemed to understand the proceedings and was able to converse as to defense strategy.

In its final order [**11] following the evidentiary hearing, the circuit court found in relevant part:

> The evidence adduced during the evidentiary hearing on August 25, 1997, generally established that Defendant Hall possesses a variety of mental health deficits that have been diagnosed, and treated, by a plethora of mental health professionals since 1978. The testimony of Defendant Hall's resentencing counsel established that each member of his defense team was completely aware of Defendant Hall's mental condition and his mental history. Defendant Hall's competence was a matter that each member of his resentencing defense team actively monitored as a result of their own interactions with Defendant Hall and with the experts who had evaluated him prior to the resentencing hearing. The subject of Defendant Hall's competence to proceed to the resentencing hearing was regularly discussed amongst the defense team themselves and was regularly discussed with the experts who had been appointed by this Court.
>
> This Court was the same Court that presided over Defendant in the resentencing hearing in 1990. This Court had the opportunity then, and at numerous hearings since, [to] observe and listen to the comments of [**12] the Defendant, and observe the interactions and interplay between counsel for the Defendant and the Defendant. The Court gives great weight to its opportunity to personally observe the Defendant in these proceedings, and to have the opportunity for the Defendant to speak to the Court in these various proceedings.
>
> The Defendant was represented at the resentencing hearing by not one, not two, but three very competent, experienced, criminal defense attorneys. All three attorneys were extremely knowledgeable in criminal defense work at the time of resentencing, and were among the most experienced and able attorneys in this portion of central Florida at that [*229] time. All had considerable experience with death cases. All three continue to prosper in their legal careers, one having become a Circuit Court Judge, one having gone into private practice in criminal defense work, and the other being the most experienced attorney on the Public Defender's staff in the Fifth Judicial Circuit.
>
> The Court has carefully considered all of the testimony received at the evidentiary hearing. While there is no doubt that the Defendant has serious mental difficulties, is probably somewhat retarded, and certainly [**13] has learning difficulties and a speech impediment, the Court finds that the Defendant was competent at the

resentencing hearings. The Court acknowledges that on this issue that reasonable minds may differ. In fact, there is a dispute in the evidence. Nevertheless, considering all of the evidence presented, including the Court's own knowledge of what occurred at the resentencing hearing, including the Court's own knowledge of what was presented at the resentencing hearing by way of evidence, knowing the Defendant's involvement in the actual carrying out of the crime, and being otherwise advised in the premises, the Court believes that its ruling that the Defendant was competent at the time of resentencing is correct, at least by the greater weight of the evidence. The most substantial, competent evidence brought to bear on the issue supports this conclusion.

Furthermore, the experienced defense counsel for Mr. Hall at resentencing were very aware of his health issues and concerns. The defense availed themselves of numerous experts to evaluate the Defendant's mental status. Defense counsel were well aware of their ethical and legal obligations in regard to the issues concerning Mr. [**14] Hall's competence in regard to the resentencing hearing. Defense counsel were in continuous contact with Mr. Hall, as they had arranged for Mr. Hall to be incarcerated locally during the proceeding. This Court has no doubt that should these experienced, competent counsel have any qualms as to whether or not Mr. Hall was legally competent to proceed at resentencing, that they would have brought this issue to the Court's attention in the appropriate manner. Accordingly, this Court finds absolutely no credibility to the claims of the Defendant that defense counsel were ineffective in any significant way in their alleged failure to bring the issues of the Defendant's alleged competency or not to the Court's attention at resentencing.

The testimony of the mental health experts offered during the evidentiary hearing wholly failed to establish that Defendant Hall was incompetent to proceed to the resentencing hearing in 1990. One of the experts opined that he believed that Defendant Hall was legally incompetent at the time of his evaluation in 1995, but could not render an opinion as to Defendant Hall's competence in 1990. The only expert who testified during the evidentiary hearing who [**15] *did* have an opinion regarding Hall's competence relevant to the resentencing hearing, Dr. Harry Krop, indicated that Hall was legally competent. Nothing has been demonstrated by the Defendant that undermines this Court's confidence in the outcome of the resentencing proceeding. The Court believes the Defendant received a very fair resentencing hearing.

In sum, Defendant Hall has failed to establish, by any legal standard even arguably applicable to a post-conviction motion, that he was incompetent to proceed at the resentencing hearing. To the extent Defendant Hall alleges ineffective assistance of counsel as an element of the instant sub-claim, he has similarly failed to establish that the sub-claim has legal or factual merit.

Final Order at 18-20.

Hall argues that the circuit court failed to properly consider Hall's mental retardation [*230] and erred in failing to set forth specific findings as to Hall's competency under the factors provided in *Florida Rule of Criminal Procedure 3.211(a)(2)*. These arguments have no merit. As noted above, the court considered all of the evidence presented by Hall and the State as to Hall's mental retardation. In its postconviction order, as we [**16] have previously noted, the court specifically found that Hall "is probably somewhat retarded."

The record reflects that, prior to his original trial in 1978, Hall was found competent to stand trial. As detailed in the final postconviction order below, the circuit judge found no reason during the resentencing to believe that Hall did not remain competent in 1990 to proceed to the resentencing. Furthermore, defense counsel did not request a competency hearing. Thus, the judge had no obligation under *Pate v. Robinson, 383 U.S. 375, 15 L. Ed. 2d 815, 86 S. Ct. 836 (1966)*, or *Florida Rule of Criminal Procedure 3.210(b)* [3] to order a competency hearing and make a judicial competency determination prior to the resentencing or the postconviction proceeding.

2 *Florida Rule of Criminal Procedure 3.210(b)* provides in relevant part:

> If, at any material stage of a criminal proceeding, the court of its own motion, or on motion of counsel for the defendant or for the state, has reasonable ground to believe the defendant is not mentally competent to proceed, the court shall immediately enter its order setting a time for a hearing to determine the defendant's mental condition . . . .

[**17] Accordingly, we conclude that the circuit judge held a full and fair evidentiary hearing as to Hall's competency claims in which he heard testimony from all relevant defense counsel and from four mental-health experts. All discussed Hall's mental retardation and expressed an understanding of the standard for finding a defendant competent, which requires that he or she be able to understand the nature of the proceedings and to confer with counsel. *See Fla. R. Crim. P. 3.211(a)* (codifying *Dusky v. United States, 362 U.S. 402, 4 L. Ed. 2d 824, 80 S. Ct. 788 (1960)*). Although the witnesses expressed concerns as to Hall's mental condition, none of the three defense counsel testified in the evidentiary hearing that he or she believed Hall was incompetent to be resentenced. One of the mental health experts, Dr. Krop, opined that Hall was competent to stand resentencing. None of the other three mental health experts expressed any conclusion as to Hall's competency for resentencing.

The circuit judge stated in his order that he relied upon all of the foregoing testimony and documentary evidence as well as his own observations of Hall in presiding over the resentencing to arrive at [**18] his determination that Hall was competent to be resentenced. The record reflects that competent, substantial evidence supports the circuit court's conclusion that Hall was competent at the time of his resentencing. [HN2] It is the duty of the trial court to determine what weight should be given to conflicting testimony. *Mason v. State, 597 So. 2d 776, 779 (Fla. 1992)*. Based upon the circuit court's factual findings and the relevant case law, we affirm the circuit court's ruling on this claim.

Accordingly, we affirm the circuit court's order denying Hall's *rule 3.850* motion.

It is so ordered.

HARDING, C.J., and SHAW, WELLS, PARIENTE and LEWIS, JJ., concur.

ANSTEAD, J., concurs specially with an opinion, in which PARIENTE, J., concurs.

QUINCE, J., recused.

CONCUR BY: ANSTEAD

CONCUR

ANSTEAD, J., specially concurring.

Although it appears that the majority opinion is technically correct in its assessment of the procedural bars invoked against Hall's present claims, I write separately to express my agreement with Chief Justice Barkett's dissenting opinion in our [*231] earlier review of Hall's case explaining why the execution of the mentally retarded violates the Florida Constitution's [**19] bar against cruel or unusual punishment. *See Hall v. State, 614 So. 2d 473 (Fla. 1993)* (Barkett, C.J., dissenting).

Justice Barkett first succinctly outlined the evidence concerning Hall's retardation:

> The testimony reflects that Hall has an IQ of 60; he suffers from organic brain damage, chronic psychosis, a speech impediment, and a learning disability; he is functionally illiterate; and he has a short-term memory equivalent to that of a first grader. The defense's four expert witnesses who testified regarding Hall's mental condition stated that his handicaps would have affected him at the time of the crime. As the trial judge noted in the resentencing order, Freddie Lee Hall was "raised under the most horrible family circumstances imaginable."
>
> Indeed, the trial judge found that Hall had established substantial mitigation. The judge wrote that the evidence conclusively demonstrated that Hall "may have been suffering from mental and emotional disturbances and may have been, to some extent, unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." Additionally, the judge found that Hall suffers from organic brain damage, has been [**20] mentally retarded all of his life, suffers from mental illness, suffered tremendous

emotional deprivation and disturbances throughout his life, suffered tremendous physical abuse and torture as a child, and has learning disabilities and a distinct speech impediment that adversely affected his development.

Hall's mental deficiency as an adult is not surprising. The sixteenth of seventeen children, Hall was tortured by his mother and abused by neighbors. Various relatives testified that Hall's mother tied him in a "croaker" sack, swung it over a fire, and beat him; buried him in the sand up to his neck to "strengthen his legs"; tied his hands to a rope that was attached to a ceiling beam and beat him while he was naked; locked him in a smokehouse for long intervals; and held a gun on Hall and his siblings while she poked them with sticks. Hall's mother withheld food from her children because she believed a famine was imminent, and she allowed neighbors to punish Hall by forcing him to stay underneath a bed for an entire day.

Hall's school records reflect his mental deficiencies. His teachers in the fourth, sixth, seventh, and eighth grades described him as mentally retarded. His fifth [**21] grade teacher stated that he was mentally maladjusted, and still another teacher wrote that "his mental maturity is far below his chronological age."

614 So. 2d at 479-80. With that factual background in place, Justice Barkett then explained her agreement with the holdings of the Georgia Supreme Court [1] and other jurisdictions barring the execution of the mentally retarded: [2] [**22]

> [*232] This Court has not addressed whether executing the mentally retarded is cruel or unusual punishment under *article I, section 17 of the Florida Constitution.* I believe it is appropriate to analyze whether imposition of capital punishment in such circumstances is either "cruel" or "unusual." First, because a mentally retarded person such as Freddie Lee Hall has a lessened ability to determine right from wrong and to appreciate the consequences of his behavior, imposition of the death penalty is excessive in relation to the crime committed. *Coker v. Georgia, 433 U.S. 584, 592, 97 S. Ct. 2861, 2866, 53 L. Ed. 2d 982 (1977).* As Justice Brennan noted in *Furman v. Georgia, 408 U.S. 238, 257, 92 S. Ct. 2726, 2736, 33 L. Ed. 2d 346 (1972)* (Brennan, J., concurring), a punishment is excessive when it is unnecessary. An excessive punishment "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering." *Coker, 433 U.S. at 592, 97 S. Ct. at 2866* (discussing *Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976)).* I believe imposing the death penalty on mentally retarded [**23] defendants is excessive, serves no purpose except to dispose of those some might deem to be "unacceptable members" of society, and therefore, is "cruel."
>
> Second, executing a mentally retarded defendant such as Hall is "unusual" because it is disproportionate. Because mentally retarded individuals are not as culpable as other criminal defendants, I would find that the death penalty is always disproportionate when the defendant is proven to be retarded. However, even without a per se rule, Hall's mental retardation and his horrible childhood represent substantial mitigation, which makes the death penalty disproportionate despite the existence of several aggravating factors. *See, e.g., Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990); Smalley v. State, 546 So. 2d 720 (Fla. 1989); Blakely v. State, 561 So. 2d 560 (Fla. 1990).* This case is illustrative of far too many cases we see at this Court; horrible crimes are repeatedly committed by those who endure sickening abuse and deprivation as children. Many, like Freddie Lee Hall, are also mentally retarded and suffer particularly severe abuse because their parents do not understand the nature of retardation. The connection [**24] between an individual's childhood and his or her later ability to function as a productive member

of society is obvious to those of us who routinely review criminal cases, and while a tragic childhood and mental [*233] retardation do not "excuse" later criminal behavior, they do reflect on an individual's culpability.

Hall, 614 So. 2d at 481.

3 The Georgia Supreme Court in *Fleming v. Zant, 259 Ga. 687, 386 S.E.2d 339 (Ga. 1989)*, explained:

> The "standard of decency" that is relevant to the interpretation of the prohibition against cruel and unusual punishment found in the Georgia Constitution is the standard of the people of Georgia, not the national standard. Federal constitutional standards represent the minimum, not the maximum, protection that this state must afford its citizens. Thus, although the rest of the nation might not agree, under the Georgia Constitution, the execution of the mentally retarded constitutes cruel and unusual punishment.

386 S.E.2d at 342 (citation omitted).

4 Justice Barkett also noted the evolution of attitudes toward mental retardation:

> Floridians' attitudes toward the mentally retarded have evolved significantly in recent decades. Those mentally retarded people committed to state care no longer are warehoused in "training centers," and a variety of procedural safeguards have been enacted to protect the rights of those committed to state facilities. See *§ 393.11, Fla.Stat.* (1991) (regulating involuntary admission of the mentally retarded to state residential services); *see also* David A. Davis, *Executing the Mentally Retarded*, Fla.Bar.J., February 1991, at 13, 15 (discussing generally how statutes have changed to reflect a more enlightened approach to caring for the mentally retarded).
>
> Society has developed a greater understanding of mental retardation. It is generally recognized now that mental retardation is a permanent learning disability that manifests itself in several predictable ways, including poor communication skills, short memory, short attention span, and immature or incomplete concepts of blameworthiness and causation. Davis, Fla.Bar J. at 13; *see also* James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants, 53 Geo.Wash.L.Rev. 414, 417 (1985)*; John Blume & David Bruck, *Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis*, 41 Ark.L.Rev. 725, 732-34 (1988). A person who is mentally retarded is not just "slower" than the average person. Mental retardation is "a severe and permanent mental impairment that affects almost every aspect of a mentally retarded person's life." Blume & Bruck, 41 Ark.L.Rev. at 734.It would appear that the trial judge did not understand the nature of mental retardation. Otherwise, he could not have reached the conclusion that the mitigating factors were entitled to little weight because he could not "definitely establish that they affected Hall at the time of the crime."

Hall, 614 So. 2d at 480-81.

Finally, Justice Barkett acknowledged that the crime involved herein was undoubtedly amongst those for which the death penalty was ordinarily reserved:

The law requires that the death penalty be reserved for the most heinous of crimes and the most culpable of murderers. *See, e.g., Songer v. State, 544 So. 2d 1010, 1011 (Fla.1989); State v. Dixon, 283 So. 2d 1, 8 (1973), cert. denied, 416 U.S. 943, 94 S. Ct. 1950, 40 L. Ed. 2d 295 (1974).* The crime committed in this case undoubtedly was heinous. A young woman, seven months pregnant, was raped, beaten, and shot to death. The horrible nature of this crime is uncontroverted, and it is certainly among the types of offenses for which the death penalty may be imposed. However, Freddie Lee Hall is not among the most culpable of murderers. Hall's judgment, thought processes, and actions [**25] are unquestionably affected by his mental retardation. He cannot understand right from wrong in the way that most members of our society do, and while he should spend the rest of his life in prison, he should not be executed.

Hall, 614 So. 2d at 481-82. I fully concur in Justice Barkett's observations and analysis, including her evaluation of the heinous nature of the crime involved. Further, it is important to note that Hall did not actually kill the victim. Rather, his codefendant, Ruffin, was the actual killer. *See id. at 478.* It should also not go unnoticed that the actual killer, Ruffin, received a life sentence while Hall was sentenced to death. *See id. at 479.*

PARIENTE, J., concurs.

APPENDIX D

APPENDIX E

Supreme Court of Florida

FRIDAY, MARCH 8, 2013

CASE NO.: SC10-1335
Lower Tribunal No(s).: 1978-CF-0052

FREDDIE LEE HALL vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Appellant's Motion for Rehearing is hereby denied.

POLSTON, C.J., and PARIENTE, LEWIS, CANADY, LABARGA, and PERRY, JJ., concur.
QUINCE, J., recused.

A True Copy
Test:

Thomas D. Hall
Clerk, Supreme Court

th
Served:

HON. ANTHONY MICHAEL TATTI
ERIC CALVIN PINKARD
RAHEELA AHMED
CAROL CONTRERAS RODRIGUEZ
KENNETH SLOAN NUNNELLEY
HON. GLORIA I. HAYWARD, CLERK
HON. RICHARD TOMBRINK, JR., JUDGE

CCRC MIDDLE
MAR 18 2013
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APPENDIX F

IN THE CIRCUIT COURT OF THE FIFTH
JUDICIAL CIRCUIT OF THE
STATE OF FLORIDA IN AND FOR HERNANDO COUNTY

SUMTER COUNTY CASE NO. 1978-CF-00052-A

STATE OF FLORIDA,

Plaintiff,

vs.

FREDDIE LEE HALL,

Defendant.

VOLUME I

Pages 1 - 134

PROCEEDINGS: EVIDENTIARY HEARING.

DATE: December 7, 2009.

TIME: 10:33 - 2:40 p.m.

BEFORE: RICHARD TOMBRINK, JR.
Circuit Court Judge

PLACE: Hernando County Courthouse
20 North Main St.
Brooksville, FL 34601

REPORTED BY: Patti Marshall, RPR, FPR
Notary Public,
State of Florida at large.

APPEARANCES:

ANTHONY TATTI, ESQUIRE
Asst. State Atty.
19 NW Pine Ave
Ocala, FL 34475
Attorney for State.

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CAROL RODRIGUEZ, ESQUIRE
and
RAHEELA AHMED, ESQUIRE,
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Tampa, FL 33619
Attorney for Defendant.

(Held in Open Court:)

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Thereupon, the following proceedings were had and taken in regard to the above-styled case out of the presence of the defendant:)

THE COURT: Good morning. This is the case of State of Florida versus Freddie Lee Hall, 1978-CF-00052-A. Our court reporter today is Patti Marshall with Joy Hayes' office. I would like the pertinent parties -- I'm sure the court reporter knows everybody, but if you could introduce yourselves, starting with the state's table, and who you are affiliated with --

MR. TATTI: My name is Anthony Tatti. I'm representing the State of Florida on behalf of the State Attorney's Office for the Fifth Judicial Circuit of Florida.

MR. NUNNELLEY: Ken Nunnelley, Senior Assistant Attorney General, also on the behalf of the State of Florida.

MS. RODRIGUEZ: Carol Rodriguez from CCRC, representing Mr. Freddie Lee Hall.

MS. AHMED: Good morning, Judge. Raheela Ahmed, also representing Mr. Freddie Lee Hall.

THE COURT: Your first name is?

MS. AHMED: Raheela, R-A-H-E-E-L-A.

THE COURT: Last name?

MS. AHMED: A-H-M-E-D.

THE COURT: Very good. Now, Mr. Freddie Lee Hall is not present. My understanding is that CCRC has waived his presence?

MS. RODRIGUEZ: (Nodding head.)

THE COURT: You have filed an affidavit indicating a waiver and request that he not be present.

MS. RODRIGUEZ: (Nodding head.)

THE COURT: Do you have anything more you want to say about that?

MS. RODRIGUEZ: No, your Honor, I will represent on the record that that is correct. Mr. Hall contacted our offices through family members indicating that he did not wish to attend this hearing. We took that information via telephone; we then made a visit to Mr. Hall in person to ascertain that that was still his wish, not to attend. At that time, we took a waiver and had him execute the affidavit that was filed with the Court in this case.

And Mr. Hall was made aware that this Court had granted our request to move these proceedings, because, initially, he had expressed a concern about coming to this particular courthouse. So he

was aware of that, your Honor. And yet still opted to engage in the waiver. So that's the extent of it, and I would represent on the record that he was fully informed when he chose to waive his appearance before court today.

THE COURT: Anybody want to be heard regarding that?

MR. TATTI: Your Honor --

THE COURT: I'm not requiring that anybody be heard. But if anybody wants to be heard, now is the time to speak.

MR. TATTI: Judge, if the Court will note, we did file a very brief response registering our objection to the waiver. And very simply, your Honor, this is a pleading which alleges that the defendant is mentally retarded. And the Court has had absolutely no opportunity to observe or inquire of Mr. Hall to assess the validity of his waiver of a fundamental right to be present at this proceeding.

(Whereupon, Ms. Ahmed left the courtroom.)

MR. TATTI: Our objection was, frankly, because both Mr. Nunnelley and myself were uncomfortable about how a court up the line would view a waiver in this setting. And I'm still,

frankly, uncomfortable with it. I will defer to the Court's ruling on the matter, but it is, at a minimum, unsettling that we would be in a posture to accept a written affidavit waiving his appearance, waiving a fundamental right on a defendant whose lawyers claim is mentally retarded, under any definition of that term. So the state objects.

THE COURT: Any response from the defense?

MS. RODRIGUEZ: Your Honor, other than to represent to the Court that we have had other clients in similar situations in evidentiary hearings that have executed these waivers in a number of jurisdictions, and have fully informed Mr. Hall of his rights. We have had occasion where the Court has conducted a hearing and actually spoken to the defendant, in addition to the waiver, only in one particular case. And in the other cases, the waiver has been sufficient in order to waive that defendant's appearance. This particular Court has had an opportunity to observe --

(Whereupon, Ms. Ahmed returned to the courtroom.)

MS. RODRIGUEZ: -- in the history of this case the defendant. So it's not a case where this Court

has not seen Mr. Hall. And so, I would just represent that -- represent that to the Court.

THE COURT: As an officer of the court -- you stated this in your affidavit, but I'm just trying to make sure it's clear on the record.

MS. RODRIGUEZ: Yes, sir, your Honor.

THE COURT: As an officer of the court, you believe that he signed that knowingly and intelligently and freely and voluntarily, wishing to not be present today, understanding what he was doing and with the understanding that he has a, as counsel has said, a fundamental Constitutional right to be here, present today?

MS. RODRIGUEZ: Yes, your Honor. I do believe that Mr. Hall did that after speaking with -- family members made the request initially. We placed a telephone call to him. He was given a few days between the date that I spoke with him by phone and the day that I went to visit him so that I would be sure that he had fully considered the issue. And we both, Raheela Ahmed and myself, visited with him and explained to him what he was doing in terms of not coming to the hearing.

Having been fully informed in that manner, he decided to go forward and still waive his

appearance. So it is my representation to the Court that it was done knowingly and voluntarily, your Honor.

MR. TATTI: And intelligently. That's the other magic word.

MS. RODRIGUEZ: Yes.

THE COURT: That's the catch phrase. I understand the state's position, and I understand the penumbras, if you will, the inferences and innuendos in what you are suggesting. It's not lost on the Court. But that is what the defense has requested.

Under the authority of Florida Supreme Court case *Brown v. State*, which is 894 So.2d 137 also at 29 FLW S. 764, the Court will approve the waiver. Apparently, it's authorized and can be done. And I certainly wasn't expecting it, but it has occurred and the Court will accept it for what it is and will note that Mr. Hall has waived his appearance here today.

MS. RODRIGUEZ: Your Honor, we have a couple of — one housekeeping matter. That is a proposed order to transcribe the evidentiary hearing and at the conclusion of the evidentiary hearing --

THE COURT: This hearing?

MS. RODRIGUEZ: Yes, your Honor. We would request the Court to grant the ability to submit written closing arguments, because of the volume of the records, and we would be able to file those written closings at the conclusion of this proceedings. I had shared with opposing counsel a proposed order with a timetable that we have used in other cases, but I have not had a response with regard to that issue and wished to address the Court in terms of filing written closings in this case.

THE COURT: Normally, I discuss that at the end of the case when we get to that point. I'm not fundamentally opposed to that, but let's see how this case plays out and how our time works out, and then we'll look at it. That would be what I would propose. Is that a problem to either side?

MR. TATTI: No, sir.

MS. RODRIGUEZ: No, your Honor.

MR. TATTI: Just so the record is clear, I arrived at my office in Ocala this morning at approximately 6:30 for the purpose of securing a vehicle to transport me to Hernando County and found counsel's pleading on my desk.

THE COURT: Which pleading are we referencing?

MR. TATTI: The request for written closing argument. So that's when I first saw it.

MS. RODRIGUEZ: I believe we filed it on December 1st.

THE COURT: I have not seen such a document, myself. But I think that's something we'll deal with at the appropriate time unless it's absolutely necessary that we deal with it now.

MS. RODRIGUEZ: Oh, no, your Honor.

THE COURT: Now, are there any other matters, preliminary, that either side wants to raise before we move on?

MR. TATTI: Your Honor, I filed, last week, and should have provided to the Court, a courtesy copy --

THE COURT: Yes (indicating).

MR. TATTI: -- a motion in limine. And I would ask that we address that issue now as, I believe, that that -- depending on how the Court rules, may shape the flow of evidence during the next day or so that we'll be here. I basically stand by my motion.

The motion requests that the Court limit presentation of evidence in three regards: First of all, the state is -- it is the state's position

that because Florida Statute 931.137 sets out a three-part test or definition of mental retardation, which the Florida Supreme Court has now clearly addressed --

THE COURT: Mr. Tatti, let me stop you at that point. I apologize for interrupting, but just appearing on my bench, just moments ago, as I walked in the door, is a limited -- what's titled a limited response to state's motion in limine. I have not seen this until just now.

MS. FAGAN: That was just handed to us.

THE COURT: And I would like to read it.

MR. TATTI: Yes, sir.

THE COURT: And I would like to take a break, recess to read it. I don't know what it says and --

MR. TATTI: Yes, sir.

THE COURT: -- obviously, these are important issues. And since there has been a response, I need to look at it.

MR. TATTI: I got it about the same time you did.

THE COURT: I wish I'd have known about it in the hour and a half we were waiting to get started today, but I didn't see it until just now.

MR. TATTI: Yes, sir.

THE COURT: So I'm going to take five, ten minutes, that should be all it will take. I'm going to go off the bench, read this, see if I need to do any research on it, and I will be right back. Court will be in recess for five minutes.

(A recess was taken.)

THE COURT: Please have a seat. Let the record reflect that I have gone off the bench to carefully review the limited response to state's motion in limine, provided as I previously walked onto the bench by the defense. I have now read it, and I'm ready to go back to where we were before I interrupted Mr. Tatti. And, Mr. Tatti, you may proceed with what you were saying about your motion in limine.

MR. TATTI: Yes, sir. The motion seeks the Court's order limiting the presentation of evidence in this hearing in three regards: First of all, under the law as it exists today, that is, after the passage of 921.137 and the Supreme Court's subsequent opportunity to address that statute, interpret it and set the ground rules for this proceeding, which I can remind the Court, when this original motion was filed, we neither had a rule or

any clear direction as to exactly how this proceeding was supposed to function, when the motion was filed back in 2005.

Since that time, a rule of criminal procedure has been adopted as well as several very enlightening opinions from the Florida Supreme Court on 921.137. My motion simply addresses the law as it exists today. And the first part of the motion requests that the Court limit the defendant to first establish that he has, within the meaning of the statute, significantly subaverage general intellectual functioning. That is the first of the three prongs of the definition of mental retardation in the statute. The three prongs that are conjoined by the word "and."

The Supreme Court has made it perfectly clear that all three parts of that definition must be present before a defendant can be found mentally retarded within the meaning of 921.137 and thus ineligible for the death penalty. The issue in this statute is Mr. Hall's mental status to be executed, not his mental status for the purpose of mitigation or anything retrospectively. It's his condition today.

I would submit that the Supreme Court has made

it clear that it is not only appropriate, but it -- their own opinion in *Cherry*, they shut down their analysis of Cherry's mental retardation at his I.Q. The last paragraph of the *Cherry* opinion clearly says because his I.Q. — I will read it. "Because we find that Cherry does not meet this first prong of Section 921.137, Subsection 1 criteria, we do not consider the other two prongs of mental retardation. Determination: We affirm the circuit court's denial of Cherry's motion for a determination of mental retardation.

So, the state submits that as the Court has the complete authority to control the presentation of evidence in this proceeding, that the Court enter an order directing the defendant, as the defendant has the burden of proof by clear and convincing evidence in this proceeding, that they first establish that Mr. Hall's I.Q. is 70 or below. Absent that demonstration, the remaining elements of the exemption are irrelevant until he can establish that his I.Q. is 70 or below. There is no need to address adaptive functioning. And there is no need to determine whether or not Mr. Hall's condition existed at the time he was 18 years of age.

I would agree that the adaptive functioning is relevant to the second and the third prongs of the definition. However, part B of my motion in limine would limit the defendant to establishing that his deficits in adaptive functioning exist concurrently with his intelligence issues, which would mean now, not when he was 15 years of age or in elementary school. And frankly, not when he was between the ages of 25 and 30, prior to his incarceration.

Mr. Hall has been a resident of the Department of Corrections since February of 1978. His relevant community is the Department of Corrections. And absolutely no part of Dr. Prichard's report addresses his level of adaptive functionings in his environment, which is what the second prong addresses. And the cases that I've cited in the motion in limine are Florida Supreme Court opinions on that regard: *Phillips v. State*, at 984 So.2d 503. That's the law. It's only if those first two elements can be established, is there any reason to look at what Mr. Hall's adaptive functioning would have been at the time he was 18 years of age, because that third prong requires that all of this, one and two, have onset at or before age 18. And what I am seeking

is simply that the Court control the presentation of evidence, as is the Court's right, consistent with clearly established Florida law on this subject.

Now, I couldn't tell you that I could have made this motion prior to *Cherry* and the cases that have followed *Cherry*. But *Cherry* and every case from the Supreme Court that has followed it make it clear that that's the procedure. And there is no gray area here. It's a three-part test, each part of which must be established. It is perfectly reasonable for the Court to direct the defendant to establish -- present evidence on the first prong, and if they can't, there is no relevance to the remaining parts of the test.

Now, if counsel -- depending on how the Court rules, should the Court grant my motion, I do not have an objection to counselor proffering what it is she wants to put in the record in some expeditious manner. But it is my position that there is no relevance to testimony concerning Mr. Hall's adaptive functioning from 30 years ago, until we have established prong 1 and prong 2 of the definition. And my position is they can't establish it. I don't think the defendant can

establish that his I.Q. is 70 or below, particularly given the fact that the report that was attached to the pleading which initiated this proceeding says that his I.Q. is 71.

THE COURT: Response?

MS. RODRIGUEZ: Yes, if we may be heard, your Honor. And I apologize for the inarticulate nature of the response. We stayed very late last night just to be able to file the limited response that we filed with the Court.

And to begin with, there are some real differences, obviously, of opinion here in terms of what the Court should or should not do on this request by the state. And I will start by saying to the Court that if it had been intended for the Court to only test I.Q. and test I.Q. first, adaptive functioning second and then move to the third prong, it would be so stated right off the bat in the rule, and it is not.

One of the things in the rule is the word mentioned "and." That means all of them co-exist together in order to make that determination. And so I would suggest to the Court, first of all, that while the Supreme Court is correct — it did look at *Cherry*, and they looked at one score in

Cherry — this is a different situation entirely that's before the Court with regards to Mr. Hall. And I say that to you because Mr. Hall has other test scores that are below 70.

Mr. Hall and the evidence shows a 60 in his prior record. And substantial evidence in that record for this Court to have found mitigation and have termed him as "mentally retarded." Mr. Cherry did not have a diagnosis of mentally retarded going into his hearing. That's a real difference between Mr. Hall and a real difference between Mr. Cherry.

The Court's question at this juncture is whether or not Mr. Hall's evaluation in 1990 and the finding by this Court of mental retardation is the equivalent of what the law provides today. That's what the Court is looking at. I would suggest to the Court that we are following the rule and, obviously, the diagnosis of mental retardation requires all three prongs. But nothing, nothing in any of the evaluations, nothing in any of the rules suggest that you just do I.Q. testing only and then go no further.

In fact, in the DSM-IV-TR, it suggests to practitioners that the first thing that manifests is the adaptive functioning. So many times, you

can have someone with an 80 I.Q. that could be diagnosed as mentally retarded if the adaptive functioning is so poor. So the Court really needs to look at all the evidence in this case on the issue of I.Q. as well as on adaptive functioning.

Now, the state has referenced a number of cases here and in its -- in its order [sic], and it's important to note that Dr. Prichard, who is the expert in this case, was the expert in *Cherry*. Dr. Prichard was the expert also in the *Brown* case. And some of the representations made by the state with regards to the analysis are important to bring to the Court's attention.

Dr. Prichard did an evaluation in one of these cases and the Supreme Court upheld his evaluation based only on I.Q. He did not go in and assess adaptive functions, because he didn't feel that the adaptive functioning at that point was going to warrant that diagnosis of mental retardation.

Now the difference is that in this case, Dr. Prichard has assessed his adaptive functioning. And the reason he's done that is because he felt it was necessary in order to testify before this Court on his I.Q. and on issues before this Court.

So, I would submit to the Court that those are

the reasons why it is important for this Court to hear the testimony on all three prongs in order for this Court to make a determination as to whether or not Mr. Hall is mentally retarded and, most importantly, whether or not what the Court is doing now is exactly the same thing and based on the same evidence that was before the Court in 1990. I would submit to this Court that the definition for mental retardation has not changed. What has changed is that *Adkins* came along, and now, instead of a mitigator, it's become a bar to execution.

So I would submit to this Court that the evidence will show, the experts will testify that mental retardation is being diagnosed in the exact same way today as it was in 1990 when this Court heard evidence on the record as to the issue of mental retardation.

Now, the legal significance of it could be different, but the diagnosis and in terms of whether a person is mentally retarded or not remains the same. For that reason, your Honor, we would like to be heard on all the issues and not have the Court limit his presentation. There has not been a limitation to the presentation in other cases, all of these cases that have been presented

before other courts. I would submit if the Florida Supreme Court wants to limit its analysis and just look at I.Q. as it did in *Cherry*, that's up to the Florida Supreme Court. But by limiting his presentation now, your Honor, the Court would not be getting the entire picture with regard to this man's intelligence and all the expert information available for the Court to make a decision on this very important issue.

And, again, I apologize for not being so succinct here with regards to the presentation. But, again, the shutdown at the analysis should not occur here. This Court should allow all the evidence into the record and then at that point, this Court can make the correct determination when viewing all of the evidence with regard to this defendant. As has been represented before, there is a plethora of expert opinion testing and information in this case. And to limit it at this point would be a travesty in terms of the representations to the Court.

I submit to the Court that at one of the status hearings, the state tried to get the Court not to have this evidentiary hearing when *Cherry* first came out. And that's exactly what's

happening right now. The Court should allow him to have an evidentiary hearing and to present evidence to this Court on all three prongs, because they must all be met. The state and I are in agreement in order for the diagnosis to be achieved.

THE COURT: Counsel, you acknowledge three prongs?

MS. RODRIGUEZ: Yes, your Honor.

THE COURT: You acknowledge all three have to be met?

MS. RODRIGUEZ: Yes, your Honor.

THE COURT: You acknowledge that the burden is on the defense?

MS. RODRIGUEZ: Yes, your Honor.

THE COURT: You acknowledge that you have to prove your burden or meet your burden by clear and convincing evidence?

MS. RODRIGUEZ: Yes, your Honor.

THE COURT: So if you don't meet one of the prongs, the whole defense fails, right?

MS. RODRIGUEZ: Yes, your Honor.

THE COURT: And the most quantitative, clear prong is the one that talks about I.Q?

MS. RODRIGUEZ: Yes, your Honor.

THE COURT: So what is wrong with requiring

you to prove that first and then if you can meet that burden, then moving on?

MS. RODRIGUEZ: Your Honor, as I said before, the definition for mental retardation -- the legal implications are different.

THE COURT: I'm not talking about the definition for mental retardation. I'm talking about the first prong, the one that says significantly subaverage general intellectual functioning. That is an I.Q. test, right?

MS. RODRIGUEZ: Your Honor --

THE COURT: That's the only way to prove that, right?

MS. RODRIGUEZ: Your Honor, I would submit to the Court that there is evidence in this record, there are a number of test scores with regard to his I.Q.

THE COURT: With all -- I think that's what the state is saying. Put those in first. Let's see what you have got as far as I.Q. Then if you can meet that burden, then, obviously, we'll move on. But if you can't meet that burden, then it's over.

MS. RODRIGUEZ: Your Honor, I would submit to the Court that the expert cannot make the

determination of mental retardation without assessing both prongs.

THE COURT: I'm not talking about mental retardation. I'm talking about the first prong, Prong Number 1, that requires significantly subaverage general intellectual functioning — my understanding, correct me if I'm wrong. I don't claim to be an expert on this — that requires an I.Q. testing at 70 or below.

MS. RODRIGUEZ: Dr. Prichard is on the witness list and certainly could have been deposed by the state on this issue, your Honor. I, myself, am not an expert. But he is coming to testify that the score that Mr. Hall obtained in this test is still within the mentally retarded range. And his --

THE COURT: Is it 70 or below?

MS. RODRIGUEZ: 71, your Honor. And it has been 71 since this motion was filed.

THE COURT: 71 is not 70 or below, is it?

MS. RODRIGUEZ: True, your Honor.

THE COURT: Doesn't *Cherry* have a bright-line test that requires 70 or below?

MR. TATTI: (Nodding head.)

THE COURT: I mean, isn't that what it says?

MS. RODRIGUEZ: Yeah.

THE COURT: I think it's *Cherry*, there is a case, I could find it.

MS. RODRIGUEZ: That is *Cherry*. I tried to distinguish Mr. Hall's case for the Court as opposed to *Cherry*, because I think it's significant that Mr. Hall has a determination of mental retardation in the record, a factual finding that he was retarded then, and he will be retarded for life. That's something that cannot be ignored by the state or the Court in looking at his case, your Honor.

MR. TATTI: And that was the third part of my motion in limine. And I would urge the Court to enforce that one now. Because if we're going to hear over and over again that the Court used the phrase "mentally retarded" in 1991, then we're going to be here for weeks. That issue is irrelevant.

THE COURT: That went up to the Florida Supreme Court already and has come back down, in this case, if I'm not mistaken. I mean, that, you raised, before we got to the evidentiary hearing.

MR. TATTI: That is correct.

THE COURT: And we tried to distinguish it. It went up, they said no.

MS. RODRIGUEZ: Your Honor, the issue is double jeopardy and whether or not Mr. Hall would subject himself to double jeopardy.

THE COURT: *There is a huge difference between a mitigator found 19 years ago prior to Adkins* even being thought of and the specific requirements under the statute and the rule in Florida that now have evolved from the *Adkins* ruling. I mean, those are huge differences. There is no -- I mean, it's not even close.

MS. RODRIGUEZ: Your Honor, my position on the subject is that the Court should allow the defense to put on the evidence and then the Court certainly can make that determination at the end of the presentation of all of the evidence. My position is that making that presentation at this point is premature in terms of Mr. Hall's case.

THE COURT: Well, I mean, if the state wants to speak further, I will let them speak, but . . .

MR. TATTI: Just quickly, to address a couple of issues.

THE COURT: All right.

MR. TATTI: Ms. Rodriguez suggests that Mr. Hall is different than Mr. Cherry, in that Mr. Hall, in his past, had an I.Q. score below 70.

I would suggest that statement is false. Cherry also had an I.Q. score below 70, among many, just as Mr. Hall has had many intelligence tests. I would refer the Court to Page 11 of the *Cherry* opinion. It's Page 11 on the West printout; it would be Page 712 in the official recorder. But Footnote 6, the court addresses the numbers of I.Q. tests that Mr. Cherry had, and it includes a score of 68 on a beta test, which interestingly enough is the same variation of tests that Mr. Hall ended up with a score below 70.

This very argument, the idea that the Supreme Court, when in *Cherry*, said the statute says two standard deviations below the mean, that means 70 or below, and excluded any discussion of this plus-or-minus statistical variation that exists in another community. The other community is the mental health professional community. We're not in that community today. Today we're in a court of law, and that definition is very clear and does not accept statistical variation. The Supreme Court made that painfully clear in *Nixon*, which is the case that's primarily cited in my motion. I have a copy for the Court.

They called the defendant to task for

suggesting as the basis of their argument that the Supreme Court was wrong in deciding *Cherry*. Judge, this situation, the law of this situation cannot be clearer. And it is perfectly within the Court's right, as the administrator of the trial of the facts of this hearing, to decide how the evidence will be presented. And I simply suggest to the Court a procedure that is efficient and legal under the existing case law and under the statute. That is that the Court require the defendant to prove by clear and convincing evidence that his I.Q. is 70 or below before entertaining evidence on any other issue. Because I submit if they can't, the other issues are irrelevant. And I further submit they can't, because the report they attach to their pleading says his I.Q. is 71.

And just for what it's worth, back when Mr. Pinkard was attached to Mr. Hall, he filed a notice of supplemental authority on the issue of whether or not the Court's prior finding in the sentencing order regarding Mr. Hall and his mental status -- he filed a notice of supplemental authority on the case of *Bies v. Bagley*, which at that time appeared at 519 Fed.3rd 324. It was a 2008 opinion from the Sixth Circuit, U.S. Sixth

Circuit. Well, your Honor, that case, if you will look in my motion in limine, on the third issue, was reversed by the United States Supreme Court, which very clearly distinguishes the two issues, the issue of mental retardation for mitigation purposes and the issue of mental retardation as eligibility to be executed.

They are two different concepts. And I would ask the Court to direct counsel to cease and desist from the further reference to your Honor's pronouncement in the sentencing order because it is irrelevant in this proceeding.

THE COURT: Well, as to the last point, I have said that. I'm not going to tell them how to try their case in that regard. But I have said that; I have written that; the Supreme Court, I believe, has approved that; and I think it's an exercise in futility for them to continue to raise it. However, that's your theory of the case. I'm not going to prevent you from doing that. However, I just point out that it's wasted on me because I recognize the difference.

Now, counsel for the defendant have anything else?

MS. RODRIGUEZ: I have nothing further, your

Honor.

THE COURT: All right. Evidence code -- Florida Evidence Code, specifically 90.612, grants to the Court the right to control the mode and order of an interrogation and presentation. And it says the judge shall exercise reasonable control over the mode and order of the interrogation of witnesses and the presentation of evidence. Then it goes through the various reasons.

I think we've all agreed that there are three prongs. They all have to be proven. Failure to prove any one is fatal to the defense. They have to be proven by clear and convincing evidence.

Quantitatively, the most straightforward of the three prongs is the first one that requires significantly subaverage general intellectual functioning. That essentially, as I understand it, per *Cherry*, requires an I.Q. test of 70 or below. I'm going to grant the state's motion in limine to the extent that I want the defense to first put in evidence of being able to meet that prong. And once that is done, if that is done, then we'll see where that gets us. I am not trying to limit the state's presentation of their case in any way other than to say we all know what has to be done. And

if you can't do it, I don't want you to play charades and, you know, let's just go forward and do what needs to be done in an orderly manner.

MS. RODRIGUEZ: Your Honor —

THE COURT: And the first thing that needs to be done is prove the first prong.

MS. RODRIGUEZ: Your Honor, we understand the ruling of the Court. And we filed a list of witnesses with the state. And this matter was not brought to our attention until two days ago. The problem that exists, your Honor, is that realizing our burden in this case, we had asked the Court to take judicial notice. We had limited our witnesses in terms of presentation here. We're planning to call two lay witnesses and three experts.

Now, the experts, your Honor, have other appearances in other courts. Having said that, where we would like to have had Dr. Prichard here to testify today, Dr. Prichard was not able, due to a family matter, to come until tomorrow. So Dr. Prichard is not expected to testify until tomorrow morning. This was a two-day presentation.

THE COURT: What time is he scheduled for tomorrow?

MS. RODRIGUEZ: He should be in tonight. So

he can come first thing in the morning. But we had reserved two days for this hearing, and I apologize to the Court again. If this had come up at an earlier time and the ruling would have been made, we could have done something to change that. But we had planned this morning to call Dr. McClaren, who is going to testify generally in terms of mental retardation. There is not an evaluation that she has done on the client — but was going to talk about the process of mental retardation and put that evidence on the record — followed by two lay witnesses that were going to testify. Dr. Krop was coming in this afternoon. Dr. Krop had tested Mr. Hall, if the Court will recall --

THE COURT: I don't recall specifically.

MS. RODRIGUEZ: He had a 72 score with regards to Mr. Hall. That evidence is in the record at the resentencing hearing. And Dr. Krop was going to testify his opinion is consistent with Dr. Prichard's finding that Mr. Hall is mentally retarded. He was going to testify to that this afternoon.

Tomorrow morning we expected to put on Dr. Prichard. So Dr. Prichard would put on the evidence with regards to what is in his report; and

that is that, in his opinion, Mr. Hall is mentally retarded, your Honor. Expecting then we would rest the case, and the state would call their witness, Dr. McClaren. So that was the order of witnesses.

THE COURT: So that would leave the state tomorrow afternoon, essentially, to put on their expert?

MS. RODRIGUEZ: We would have Dr. Prichard in the morning, and it's not a long presentation, your Honor. They have one witness. I don't foresee my questions taking it past tomorrow. But that was my understanding of how our calendars were going to work through the next two days.

THE COURT: But for the state's motion in limine, who would be your first witness?

MS. RODRIGUEZ: Dr. Valerie McClain.

THE COURT: Is she here today?

MS. RODRIGUEZ: She is, your Honor.

(Whereupon, Dr. McClain raised her hand.)

THE COURT: Would she be able to talk about I.Q. tests in this cause?

MS. RODRIGUEZ: Your Honor, she did not test Mr. Hall. I was going to have this particular witness speak with regards to the definition, if you will, of mental retardation and whether there

has or has not been any change in the law with regards to how mental retardation is defined, in terms of conducting evaluations.

THE COURT: Is this person a lawyer?

MS. RODRIGUEZ: She's -- no, your Honor. She's talking about definition of mental retardation from the perspective of a psychologist.

THE COURT: Okay.

MS. RODRIGUEZ: She works, as well, with the department -- the State of Florida with regards to the evaluations of mentally retarded individuals. So just to give an historical, if you will, your Honor, in terms of the definitions of mental retardation. General information, your Honor, not specific to any testing of Mr. Hall.

That was our intent this morning, followed by two lay witnesses, who are relatives of Mr. Hall, who would talk about adaptive functioning very briefly, as well, your Honor, because there has been a lot of evidence already in the record. And that was our order of witnesses.

THE COURT: These things that are in the record that you want the Court to take judicial notice of, do you have copies of those?

MS. RODRIGUEZ: We have -- we asked the Court

to take judicial notice of the entire record. Now, we do have those pulled, your Honor, where we could produce those and show the Court specifically which ones those are.

THE COURT: Because this -- again, we went through this, this morning. I thought it was clear. The entire file is -- first of all, the file is a Sumter County file. We're in Hernando County. It's a neighboring county, same circuit, but we're in Hernando County. The file is approximately 27, 28 volumes, I believe, somewhere -- it's in the 20s somewhere. We only have here, today, the last two volumes, which are -- well, there must not be that many then, because I have 22 and 23 here. So there must be 23 volumes.

We decided after conferring with your office that we didn't need to bring all of the files over here today, and as long as you are going to provide authenticated copies that are not objectionable to the state, I don't have a problem with your concept of judicial notice, at least on that basis. But I want to make sure that you know we do not have the official court file in this building today.

MS. RODRIGUEZ: Yes, your Honor. I'm aware of

that, your Honor. And that would be for the purposes of the Court's consideration of the evidence in terms of documents and exhibits and that type of thing. We were not introducing any of those things again through witnesses.

THE COURT: Well, again, if you want to put something into evidence in the nature of judicial notice, and assuming it's something in a court file, you need to have it and then provide it. Because it wasn't my intention to go back and reread the entire resentencing case, which I know went on for approximately, if I remember correctly, a week or six days, back in 1990.

MR. TATTI: Yes, sir, that's my recollection.

THE COURT: So, as long as you have pulled and provided copies for the state of what you want me to take judicial notice of, I want you to understand we do not have the court file here other than the last two volumes.

MS. RODRIGUEZ: I understand, your Honor.

THE COURT: Now, in light of this explanation as to the witnesses and how they are scheduled and who they are and what they might be testifying about, what's the state's position?

MR. TATTI: Well, first of all, with regard to

Dr. McClaren and, whether or not the state — when and whether or not the state will present Dr. McClaren's testimony, frankly, at this moment, my best guess, your Honor, would be that I will not present Dr. McClaren's testimony. Because I — unless something alarming happens over the course of the next day and a half, I do not believe that it will become necessary. Dr. Prichard is very familiar with the history of Mr. Hall's intelligence testing. He summarizes it in reasonable fashion in his report.

I, frankly, as I informed the Court when I asked the Court to appoint Dr. McClaren, Dr. McClaren's original appearance in this case was to assist me in having access to materials that I would not have access to but for a psychologist providing them to me. And to conduct an overall assessment of the history of Mr. Hall's intelligence testing, which he has done from the records I received as purported to be the records that Dr. Prichard received. So I'm telling you at this point, there is a reasonable probability I will not call Dr. McClaren.

Now, with regard to the defendant's proposed order of witnesses, obviously, I've addressed the

issue of the two civilian witnesses, who I assume are members of Mr. Hall's family. My objection is until his I.Q. is established, that that's not relevant, and the Court has ruled in that regard.

With regard to Dr. McClain, I submit, your Honor, if Dr. McClain is being called to the stand to give a general opinion of what mental retardation is, I submit that is likewise irrelevant. The Court asked if she was a lawyer, because I gather the Court understood that continuing to waive the phrase "mentally retarded" around within the context of the Diagnostic and Statistical Manual IV Text Revision is not the issue in this hearing.

And while -- whether or not a particular professional engaged in appropriate behavior in assessing someone's intelligence quotient, this may be relevant to that. But the finding as to whether or not Freddie Lee Hall is mentally retarded has nothing to do with the Diagnostic and Statistical Manual. It is a legal determination. And if Ms. McClain cannot say that she gave an intelligence test, her testimony is irrelevant to the first prong.

THE COURT: The Court's concern here is that

if, for some reason, the defense, despite your doubt, if the defense is able to demonstrate I.Q. below 70, such that it would at least arguably create an issue of the first prong, we're going to need to go forward, obviously, with the other prongs. If we simply wait and see if that happens, we are -- it is possible we'll run out of time, because we only have two days set for this proceeding.

With that in mind, I'm wondering wouldn't it be a more prudent use of time — by the way, I know how long it would take for me to get another full day of trial, and it would be months. It would be sometime in April or May. I'm thinking that we should plow forward today in light of -- or despite the state's very cogent motion in limine, just because if we don't and the defense is able to meet the prongs, we're going to run out of time. We're already 30 minutes before noon, and we have not gotten anywhere yet.

Now, I understand your — I don't think it's come in yet in the form of a motion, but your concerns about what the first defense witness would testify to — and you are correct, I do share those concerns because none of what was proffered sounded

relevant to what we need to determine here today and tomorrow. But my thought is let's go forward with somebody, and let's get going, because I didn't set two days aside just to do nothing and then come back in another three or four months and try again.

MR. TATTI: Yes, sir.

THE COURT: That's my thought.

MR. TATTI: As the Court was able to find in the evidence code, you are the one that decides how the evidence is to be presented. My motion in limine was simply the state's suggestion as to the most expeditious manner to do that.

THE COURT: And in an ideal world, it makes perfect sense. But in the ideal world, we wouldn't have all these people out there waiting and we could call them when we wanted. Apparently it's been set up so that one shows up one day and another shows up -- I understand that that's necessary in this practical world. I think we need to do what we can do and hear what we need to hear. And I would ask that the defense try to keep it on point. I think we know what the law is. We need to keep it within the reasonable parameters of the law and keep it on point.

And state, obviously, I know you don't need any encouragement from the Court, but if you think that they have varied from the relevant issues, then please make an appropriate objection.

MR. TATTI: Yes, sir. And I understand the Court's -- how we're going to proceed. I would just ask that the record be clear that the Court has granted the state's motion in limine regarding --

THE COURT: I have.

MR. TATTI: -- regarding the order.

THE COURT: I have. I would grant it on all three points. You made three points, I have looked at them all, and they all seem to be accurate statements of the law to me.

MR. TATTI: I just want the record clear that that is what has occurred. I understand what the Court's intention is with regard to the civilian witnesses. I would only ask that the Court make it clear for the record that you are going to allow the presentation of those witnesses, if you will, out of turn, and I would ask that they be proffered and in the form of a proffer, because the preexisting condition has not been met at this point, that is, the establishment of Mr. Hall's

intelligence quotient. I just want the record clear.

THE COURT: I did grant -- I am granting the motion in limine in all three parts. I think it's we'll taken. I think it's an accurate statement of the law. As I said, it's a practical problem now that all the witnesses we want are not here; some won't be here until tomorrow. So I think we need to do what we can do with what we have or we run the risk of running out of time and then delaying this case further. And I don't think that's what anybody wants us to do.

MR. TATTI: Yes, sir.

THE COURT: With that being said, Counsel, I want you to call, and in light of what the Court's ruled, call your first witness and let's try to get something going here.

MS. RODRIGUEZ: Yes, your Honor. The defense would call Dr. Valerie McClain.

DR. VALERIE McCLAIN,

the witness herein, being first duly sworn, was examined and testified as follows:

THE WITNESS: I do.

DIRECT EXAMINATION

BY MS. RODRIGUEZ:

Q Good morning, Dr. McClain.

A Good morning.

Q Can you please state your full name for the record?

THE COURT: And spell for the record both your first and last names, please.

THE WITNESS: Certainly, your Honor. Dr. Valerie, V-A-L-E-R-I-E, R, period, McClain, M-C-C-L-A-I-N.

BY MS. RODRIGUEZ:

Q And what is your profession?

A That of a licensed psychologist in the state of Florida, Georgia, and North Carolina.

Q And can you please tell us your educational background as it relates to neuropsychology and other specialties?

A Certainly. I received my bachelor's, master's, and doctoral degree from Florida Tech in Melbourne, Florida. I completed my internship at Portland VA Medical Center and then completed a post-doctoral fellowship in neuropsychology and rehabilitation at the Rehab Hospital of the Pacific in Honolulu, Hawaii. After I completed my fellowship, I

went on and became employed as a licensed psychologist working in the areas of neuropsychologist and also rehabilitation.

Subsequent to that, I engaged in private practice in the area of forensic psychology and clinical psychology in the state of Florida beginning in 1994. Since that time, I've worked in the areas of neuropsychology and forensic psychology. At present I am employed in a neurology firm part-time, 34 hours a week, and I also own my own private practice in forensic psychology.

Q And you are certified?

A Correct.

Q In the state of Florida?

A Correct.

Q Have you published any articles?

A Yes, I have.

Q And can you tell us how many times you have been qualified to testify in court?

A Yes, I've been qualified over 600 times in court to testify.

Q How many of these have been criminal cases?

A Approximately 450.

Q Of those, how many capital cases have you testified in?

A I've testified in approximately four capital cases.

MR. NUNNELLEY: How many, I'm sorry?

THE WITNESS: Approximately four, sir.

BY MS. RODRIGUEZ:

Q Have you testified for the defense and the state, or what's the breakdown on that?

A In the capital cases specific to testimony, I've testified once for the state and three times for defense.

Q And do you attend continuing education courses in maintaining your license?

A Yes, I do. Annually, I attend at least 20 hours of continuing education, typically in the areas of forensic and neuropsychology.

Q Have you been recognized as an expert in clinical psychology with a subspecialty in clinical neuropsychology?

A Correct.

Q Have you ever failed to qualify as an expert?

A No.

Q And Dr. McClain, have you ever been qualified as an expert in mental retardation?

A Yes, I have.

Q How many times?

A In capital cases, as far as the death penalty cases, one time. In the pretrial, also one time, and that would be in Sarasota or Manatee County. So two times total; one would be post-conviction, one would be pretrial.

Q Were you able to claim mental retardation as a subspecialty?

A Yes, based upon both my clinical practice and also the evaluations.

Q In the course of your clinical practice, have you had occasion to work with the Agency for Persons with Disabilities in the state of Florida?

A Yes, I do.

Q And are you familiar with the agency's guidelines for benefit eligibility under the category of mental retardation?

A Yes, I am.

Q Dr. McClain, I'm going to show you what's been marked as Exhibit C for identification. It's a copy of . . .

(Whereupon a discussion was had off the record between opposing counsel.)

THE WITNESS: Yes.

BY MS. RODRIGUEZ:

Q Is that a fair and accurate representation of

your credentials and your CV?

A It is.

(Defendant's Exhibit C identified for purposes of the record.)

MS. RODRIGUEZ: Your Honor, at this time I would like to move Dr. McClain's CV into evidence and tender her as an expert in clinical psychology with a subspecialty in the areas of neuropsychological, mental retardation -- forensic, neuropsychological assessments and mental retardation.

THE COURT: Let's do it one step at a time. First, the CV, you want to offer that into evidence?

MS. RODRIGUEZ: Yes, your Honor.

THE COURT: Any objection to that?

MR. TATTI: Yes, sir, it's hearsay.

THE COURT: That it is, but it's hers.

MR. TATTI: Well, notwithstanding the fact that it's hers.

THE COURT: Your name is -- a person's name is technically hearsay, isn't it? Because you don't know what it is until someone tells you?

I mean, seriously, are you objecting to the CV?

MR. TATTI: To the introduction of the curriculum vitae, yes, sir. I'm not going to oppose Dr. McClain being recognized as an expert by the Court, because I think she's established grounds for the Court to do that. But admitting the curriculum into evidence is inappropriate because it's hearsay.

MS. RODRIGUEZ: Your Honor, we laid the proper --

MR. TATTI: It does not tend to prove a material fact in this proceeding.

THE COURT: Then it's not hearsay. It's not offered -- well, I mean --

MS. RODRIGUEZ: Your Honor, the fact --

THE COURT: Seriously, I have never heard anyone object to that.

MR. TATTI: I never heard anyone offer to admit a CV.

THE COURT: I've seen it done many times.

MR. TATTI: In a criminal case?

THE COURT: I don't know about that.

MS. RODRIGUEZ: In post-conviction work, it's done all the time.

MR. NUNNELLEY: That's irrelevant.

THE COURT: Is there anybody in particular in

there that --

MR. TATTI: No, sir --

THE COURT: -- do you want.

MR. TATTI: -- it's the principle.

THE COURT: Do you want to voir dire?

MR. TATTI: I have two questions or one question.

THE COURT: You want to voir dire on that?

MR. TATTI: Not the CV but --

THE COURT: Okay.

VOIR DIRE EXAMINATION

BY MR. TATTI:

Q Dr. McClain, you indicated you have been recognized twice, I believe, as an expert in the area of mental retardation?

A With respect to capital cases, sir.

Q When was that?

A That would have been the *Pompey* case. That would be the pretrial and that was in approximately 2005. And then also in the Paul Brown case.

Q When was that?

A I believe that was in -- I can check the record that I have here. I think it was 2004.

MR. NUNNELLEY: Can we get the middle name for -- of the Paul Brown for the record? We have

two Paul Browns on death row.

BY MR. TATTI:

Q Do you know his middle name?

A No, I don't, not off hand.

Q Do you know what jurisdiction the case was in?

A Did you want me first to get the date? I'm just looking for you.

Q Yes, ma'am.

A 2003, Hillsborough County.

Q That's Paul Brown?

A Correct, sir.

Q You said the other case —

A That was *Pompey*. That was in Manatee County, 2005.

Q In 2005?

A And those were just the capital cases. But as far as qualifying as an expert in mental retardation cases, it goes beyond the capital cases.

Q But you said there were two, those were the two?

A The capital cases, yes.

MR. TATTI: I don't have any other questions.

THE COURT: Still object to the introduction of the CV?

MR. TATTI: Yes, sir.

THE COURT: I'm going to overrule that objection and allow the CV into evidence as Defense Exhibit 1.

(Defendant's Exhibit 1 received in evidence.)

THE COURT: And Mr. Tatti, the state has no objection to the qualification of the witness?

MR. NUNNELLEY: Give us just a minute, Judge?

MR. TATTI: As an expert in the field of clinical psychology? No, I have no problem with that. If the Court was inclined to find her an expert in the area of mental retardation, yes, I would have a problem with that.

THE COURT: Thank you for specifying that. All right. Counsel, you may proceed.

BY MS. RODRIGUEZ:

Q Dr. McClain, who retained you to work in this case?

A I was retained by CCRC, Capital Collateral, Carol Rodriguez.

Q What were you asked to do in this case?

A I was asked to examine documentation that pertained to the issue of mental retardation for the defendant Freddie Lee Hall.

Q Can you describe what information you gathered or reviewed in preparation for your testimony?

A Certainly. I reviewed the prior psychological evaluations, including testing conducted on Mr. Hall. I reviewed academic records that were provided. I reviewed basically the prior transcript of the trial proceedings and also reviewed additional information including medical records.

Q Are these the types of records that you normally rely upon and are relied upon by experts in your field?

A That's correct.

Q What is the American Association of Mental Retardation, referred to as the AAMR?

A It's an association dedicated or committed to basically providing services and safeguarding essentially the rights of individuals who are mentally retarded and also administering the services and setting the standards.

Q And the American Psychiatric Association, is that a different group?

A The American Psychiatric Association would not be an association that I'm affiliated with. That would pertain more to psychiatrists who are practicing.

Q Have these groups developed definitions for defining mental retardation?

A Yes, they have.

Q If so, what is that definition?

A Basically, it's three-prong. It's that when they there is subaverage intelligence relative to the normal person, meaning that it would be two standard deviations below the norm established as average. Secondarily, that there is significant adaptive deficits in several areas of functioning, such as social community, functional skills. And also, three, that there is evidence of these difficulties prior to the age of 18.

Q And how are those definitions used by clinicians and psychologists?

A Essentially, as a clinician or a practitioner, the definition would pertain more to the Diagnostic and Statistical Manual utilized by psychiatrists and psychologists. There are different definitions and different standards, for instance, for the Agency for Persons with Disabilities who have very strict criteria standards, meaning that they establish essentially a cutoff point and then they look at the adaptive deficits in combination.

Q What is the Diagnostic and Statistical Manual specifically?

A Some people call it the bible of psychiatrists and psychologists. It's used to specifically reference

a diagnostic category of mental illness or a clinical condition or syndrome and then look at criteria that allow you to establish that that disorder exists.

Q Does that particular manual define mental retardation?

A Yes, it does.

Q Is that definition different from the one you just provided as far as the AAMR and APA definitions?

A It's not different with the exception that I think it mentions that from the standpoint of a psychologist's training, that they have what they call a standard error of measurement that's taken into consideration as opposed to, for instance, different definitions that don't take that into consideration.

Q Are you required to use the diagnostic manuals when you evaluate for mental retardation?

A Yes, as licensed psychologists we are required, or I am certainly required, to utilize the definition that's provided in the DSM or the diagnostic and statistical manual.

Q Are you familiar with Chapter 393 Florida Statutes?

A Yes.

Q And that is dealing with what population?

A Basically those with mental disorders,

including developmental disabilities such as mental retardation.

Q How are persons diagnosed as far as mental retardation is concerned under that particular statute?

A Well, essentially, that would pertain more to the Agency for Persons with Disabilities. And basically, their current standard for establishing mental retardation would be that the individual has a subaverage intelligence, essentially 70, and that they have significant adaptive deficits and that there was evidence of those problems prior to the age of 18.

Q And in the course of your work, you have evaluated children through the school system?

A Yes, I have.

Q And how are they referred to you?

A Typically, they would come through the office of social security disability or through the schools, themselves, when there is a need to identify specific developmental problems including the possibility of subaverage I.Q.

Q How long has this type of system been in place in the state of Florida?

A Certainly, since I've been practicing. Since I've been practicing in Florida, since '94, but to my knowledge in affiliation for the agency with the Agency

for Persons with Disabilities even prior to '77.

Q Is it statewide or county specific? Are there variances?

A I'm mostly familiar with Florida in the areas of Pasco, Pinellas, and Hillsborough, which is the consistent type of standards.

Q What tests are normally administered?

A Essentially for intelligence, they prefer the more comprehensive intelligence tests such as Stanford-Binet, Version IV; also the Wechsler Intelligence for Children or Wechsler Adult Intelligence Scale, and that would be -- currently, they are at Version IV.

Q What criteria is required for placement into special classes for these children?

A Well, what would happen is essentially you would submit the results of the testing and there would be staffing through an individual education plan. At that point, they decide based upon the testing, behavioral issues, and mental issue, what would be the most appropriate avenue for the children to learn from. For instance SLD would be slow learner as opposed to educatably [sic] mentally handicapped, if they determined that they had, like, mild mental retardation.

Q In a review of the records in this case -- you

reviewed some school records with regard to Mr. Hall?

A Correct.

Q And did you see any information with regard to testing, any I.Q. testing conducted of Mr. Hall in any of those records prior to age 18?

A No.

Q Was there any evidence that Mr. Hall was in any special classes?

A Not to my knowledge. It suggested he was slow and had difficulties with comprehension. But there was a referral but not a placement.

Q What was the criteria being used for eligibility based on a diagnosis of mental retardation, if you know, in 1963, prior to Mr. Hall's 18th birthday?

A Essentially, historically, there was a change in the Agency for Persons with Disabilities standards. In 1977, they went from using and assuming a one standard deviation, which would have been 84, 85, I.Q., and went to two standard deviations. So at the time, in 1977, historically, it changed so that adaptive deficits were a constant, but the I.Q. changed from being one standard deviation for admission in consideration as mental retardation to two deviations. So, essentially, in '77, there was a transition to it being 70.

Q When the statute was modified and the change

was made, what happened to those people that were in the borderline range?

A The individuals in the borderline range essentially were grandfathered in, meaning that the services that had been extended to them would continue for them and they would not be excluded.

Q When conducting an evaluation for mental retardation with regards to developmental services, do you have to use certain tests? I believe you mentioned the one preferred. Are there a variety of tests?

A There is a variety, but I think the scope is very limited actually and goes to the issue of well-established objective tests that have norms and reliability and validity that are acceptable.

Q Are there specific tests recommended for the testing of adaptive behavior?

A Yes.

Q How is that adaptive behavior defined?

A It's defined -- of course they are going to ask questions with regard to communication skills, social skills, functional skills, such as safety, the ability to operate in their environment, as well as questions pertaining to work.

Q As far as the adaptive behaver is concerned, what specific tests — are they stated in the statute or

in rule?

A Yes, there are specific tests that are stated in the statutes and also through the Agency for Person with Disabilities that would include tests such as Vineland Adaptive Maturity Scale and also the Adaptive Behavioral Assessment System.

Q When conducting an evaluation for mental retardation for developmental services eligibility, if an individual should test over 70 on an individually administered intelligence test, are you authorized to stop the evaluation procedure?

A Well, essentially, this is something that I've interviewed both with the senior human service counselor Polly Young, as well as one of the other specialists. It's very critical to be discretionary in how you approach the testing. If it is, say, a point difference or a two-point difference, then one can consider -- has a license to consider the adaptive deficits and should consider the adaptive deficits. If the I.Q. should be, for instance, high in the 70s or closer to 80, it's more a judgment call that might not be made.

In other words, it has to be very close to the cutoff because they are fairly stringent as far as using a 70 at this point. However, with a 70 or 71, 72, if there is evidence that there is significant adaptive

problems, then they can have some margin for including that person.

Q So hypothetically, if you were evaluating Mr. Hall's eligibility for developmental services and his I.Q. was a 71, are you required to assess his adaptive behavior?

MR. TATTI: I object to the relevance of that.

THE COURT: What's the relevance, Counsel?

MS. RODRIGUEZ: Your Honor, I'm trying to establish the guidelines in terms of Mr. Hall's placement in terms of the special education classes and where he would have been had there been a formal evaluation done at the time he was in school. There is evidence in the record with regard to part of the work being done but not all of it. So I asked a hypothetical question with regard to that.

THE COURT: Go ahead.

MR. TATTI: I was going to say even based on the questions that have been asked and answered to this point, the witness has indicated the standard completely changed in 1977.

THE COURT: And the only standard that's relevant to the Court is the standard set forth in the criminal statute and in the criminal rule, all

as set forth in Cherry and its progeny.

MS. RODRIGUEZ: I understand.

THE COURT: What might be the rule somewhere else or what might be the standards in some other setting are really not any relevant issue that's germane for consideration by this Court. And so I will sustain the objection. I think we're just going too far afield.

BY MS. RODRIGUEZ:

Q Are you familiar with a Rule of Criminal Procedure 3.203?

A Yes.

Q And the definition of mental retardation in that statute?

A Yes.

Q Can you tell us if there is a difference between that definition and the definition contained in the other -- the other definitions, if you will, that we've talked about today?

MR. IAITI: Your Honor, I would object because I'm not sure at this point this witness has been qualified as an expert such that she would be in a position to give opinion testimony on the difference between a legal definition as opposed to a definition that's relevant to her field.

THE COURT: And it doesn't matter. I mean, what matters is does Mr. Hall meet the definition that's in the rule and in the statute and in the case law that's before the Court, not whether he might meet some other standard. That's irrelevant.

MS. RODRIGUEZ: I understand, your Honor. We're attempting to establish that before the rule, Mr. Hall met the criteria for the rule that was subsequently enacted. There was no rule at the time that Mr. Hall was in school, and we're just trying to establish that, had he been evaluated, Mr. Hall would have received an entire evaluation of both his I.Q. score and his adaptive score. And that's what we're trying to establish for the record. Again, it was prior to the Court's ruling today, your Honor.

THE COURT: Mr. Tatti?

MR. TATTI: That is irrelevant. How he would have been treated as a child if the rules were different in 1963 is completely irrelevant to the issue we are trying to determine today.

THE COURT: It's speculative, conjectural; it's just not relevant. I mean, I understand your dilemma, if you will. But, I mean, it's just -- I will sustain the objection. It's irrelevant.

MS. RODRIGUEZ: I have no further questions.

THE COURT: All right.

MR. TATTI: No questions.

THE COURT: May this witness be excused?

MS. RODRIGUEZ: Yes, your Honor, she may be excused.

THE COURT: Thank you very much for coming in today. You are free to go about your business. If you are under subpoena, you are released.

THE WITNESS: Your Honor, thank you. I appreciate it.

THE COURT: Thank you. Who would be your next witness if you have one now and how long would they take, approximately?

MS. AHMED: The next two witnesses are family members, Mr. Hall, Mr. Lugene Ellis, and Mr. James Hall. I would estimate maybe, depending on how far we're allowed to go, maybe 30 minutes.

THE COURT: For both or for each?

MS. AHMED: For each.

THE COURT: Let's try the first one and see what happens. Pick one, either one, and we'll go.

MS. AHMED: Can we call Mr. Lugene Ellis?

THE COURT: Lugene Ellis?

MS. AHMED: Yes, sir, it's spelled

L-U-G-E-N-E, E-L-L-I-S.

THE COURT: L-U-G-E-N-E.

MS. AHMED: Yes, sir.

LUGENE ELLIS,

the witness herein, being first duly sworn, was examined and testified as follows:

THE WITNESS: I do.

DIRECT EXAMINATION

BY MS. AHMED:

Q Good afternoon, Mr. Ellis.

A How you doing?

Q I'm going to need you to speak up so the court reporter can get down everything that you say and so that everyone can hear you, okay?

A Okay.

Q I would like you to state your name for the record, Mr. Ellis, and spell it for us.

A Lugene Ellis, L-U-G-E-N-E, E-L-L-I-S.

Q How do you know Mr. Freddie Lee Hall?

A Excuse me. Well, I knowed him from his birth. I'm his brother. We just got different last names.

Q Do you and Mr. Hall share a same father?

A Say again?

Q Do you and Mr. Hall share the same father?

A No, we have different fathers.

Q How much older? What's your age difference between you and Mr. Hall?
A Got to be 20-some years, because I'm 80.
Q So about 20 years?
A Right.
Q Let's talk about the early years in Mr. Hall's life, okay? Where was Mr. Hall born?
A He was born in western Florida.
Q And how many siblings did you have in the household?
A There was 11 head of us boys and girls, 11 kids.
Q And where was Mr. Hall in the sibling range? Was he the eldest, the youngest?
A Freddie?
Q Yes.
A He the youngest.
Q He's the baby of the family?
A Right.
Q And do you recall Mr. Hall's birth at all?
A Well, he was by midwife. He wasn't born in the hospital, he was midwife.
Q Did you live at the house when Mr. Hall was first born?
A Lived at the house.

Q Besides you, were the rest of the siblings living in the same house?

A Let me see. The oldest was living there in the same house except -- except two of them, that's all.

Q Now, what are your earliest memories of Mr. Hall in terms of a child? How did he behave?

A Well, I remember him from -- from his birth up until -- I stayed right in the house until I was 16 or 17 years old. I'd go to Lakeland, stay with my sister, and I'd come backward and forwards from the house then.

Q Tell me how Mr. Hall behaved as a child compared to the other children.

A Well, he never did -- he never was -- act normal like the other children. He was a little different altogether. He just wasn't like the other kids.

Q What do you mean he was a little different?

A He'd do things different. He'd go up into trees and beat cans to keep you from going to sleep and busted out the back windows in the house from something coming after him. He was real scary or something. So he just wasn't normal like the other rest of the kids.

Q When you said Mr. Hall was afraid that something was coming after him, can you explain to us what Mr. Hall thought was coming after him?

MR. TATTI: Object to that.

THE COURT: Sustained.

BY MS. AHMED:

Q How often did Mr. Hall bust out the doors and think that something was coming after him?

A Whenever I was there, every night, he might bust out every night if he stay in there, because he ain't gonna stay in there, because something coming after him. He'd say something coming to get him.

Q So this happened almost every night?

A Right.

Q And do you recall any trouble that Mr. Hall had in his speaking or talking?

A Well, his — his language, he never couldn't speak too good. He'd speak foolish talk all the time, you know, he didn't have a good understanding or something. We just wouldn't pressure him too much because we didn't want to make him angry, or something. We sisters and brothers, you know.

Q When you say he didn't have a very good understanding, what you do you mean?

A He just wasn't normal like the rest of us. He could be misled. You could tell him something, and he could just be misled any kind of way, because he wasn't — he different function like the rest of us, but

we could understand him, because we was his sisters and brothers. And we would just go along with him.

Q Do you know a little bit about Mr. Hall's schooling?

A In his schooling, I don't want to say I know about his schooling. I know he went to school, but I don't know how he acted or how he was, the way he was. I don't know nothing of that.

Q Do you know if Mr. Hall was able to read?

A He couldn't read too good. And he can't write, because I can't understand his writing now if he write me a letter. I got all his letters, I can't read them.

Q So, even now, Mr. Hall can't read or write very well?

A I don't know about the reading. But I know he can't write. But, I believe, somebody in the prison system where he is tried to write my name down, because that be written out good. But the rest of the writing, I don't believe anybody could read it.

Q So you still have contact with Mr. Hall today?

A Right.

Q Let's talk about Mr. Hall and, you know, his work life. Okay? Do you know if Mr. Hall ever was able to hold any jobs?

A No, he used to work for me. I carried him up to New York to pick apples and cherries, and he wouldn't want to live in the place where the rest of the people lived. So I gave him a place of his own, because I had about 114, 125 head of people there. And he busted out and said something trying to get him and he wanted to be out where he could run all the time.

Q So the only job he had was picking fruit?

A Yeah, oranges here in Florida and fruit up in the north.

Q He didn't have any other jobs beside that?

A Not that I know of.

Q What does picking fruit entail, just that, picking fruit, nothing more?

A In New York, I just picked cherries, apples, peaches, and prunes. But in Florida, I run orange groves.

Q And did you ever have any trouble with Mr. Hall working, you know, picking fruit in the farms?

A When he picked fruit for me, I knew he was shaking grapefruit, because I paid by the box to shake grapefruit. He'd shake down about 10 or 12 trees, and he'd pick up around two or three trees and that's it. He'd say, I'm ready to move. I'd say, Well, what you going to do about all that fruit back there? He'd say,

That back there? I said, Yeah. You go back there and get that. Then I try to move. Because he would leave all that back there.

Q So he had trouble even doing that job?

A Yeah, but I tried to get out there and show him, because he was my brother.

Q All right. What about the money that Mr. Hall made from picking fruit?

A If he made money and you pay him on, say, three or four o'clock Friday afternoon, Saturday morning, I don't know where — what he'd do with it, he may not have one quarter. He be trying to borrow some money. He just couldn't -- I don't know what he'd do with it.

Q And do you know if Mr. Hall ever had a checking account, any sort of --

A He never had no checking account.

Q Do you know if Mr. Hall was ever able to cook for himself?

A No, he couldn't cook. If he could cook, I wouldn't eat it.

Q So, you always had to have someone cook for him?

A Yeah, my mother. She tried to take care of him just like he was a baby.

Q And even, you know, when Mr. Hall was living with his mother and his family, did he ever do his own laundry?

A No, my mother did all that.

Q Could he do any of that?

A I don't know. I don't want to say. I wouldn't let him do mine, but I know she would never let him do that, she would do that.

Q Was Mr. Hall ever in charge of any of his siblings? Would he babysit?

A Say what now?

Q Mr. Hall, Freddie, did he ever -- was he ever in charge of the other siblings or babysitting the children?

A No, he wasn't.

Q Why is that?

A He couldn't hardly take care hisself, how he going to take care of the other kids? They don't trust him to do nothing like that.

Q So, Mr. Hall could not even take care of himself?

A No.

Q Now, did Mr. Hall play any sports?

A I never did see him play, but he tried to play a little football. He used to be at the house and I

figured he was going to kill hisself. He would have his shirt off, practicing by himself, run and jump and catch on the chest on the ground. I said, Boy, something going to stick through you chest or something down in there. He's say, Oh, ain't nothing going to hurt me. You know, I was afraid for him all the time. But he never did get hurt.

Q And he would just doing keep doing this?

A Yeah, he'd keep doing. He called it practicing at home.

Q Now, I know you took Mr. Hall under your wing when you went up to New York. Do you know if Mr. Hall ever drove?

A No, he ain't never drove because I know I asked him to go out there and fill up a — check the oil in the tractor. So the guy was waiting for my boss, he came in and said, Mr. Ellis, that boy done put a whole case of oil in the tractor. I said, No, I just wanted him to check the oil. I went out there, and he done put so much oil in it run out the hole he be putting the oil in. I said, I thought I told you to -- he said, You told me to fill the bugger up. He filled it up, too; put a whole case in it.

Q So, he couldn't even do that?

A No, couldn't trust him to do that.

Q Mr. Ellis, I think I asked you this before, but you still have -- you still visit your brother?

A Yeah, we visit him.

Q And does he still have, you know, those same problems communicating with you?

A Well, when I go to visit him, he don't ever talk too much. One thing, I just tell him, You get all you can to eat. And, I don't know, I don't like the way he eat, you know, he just like (indicating) all the time. But he been doing that from birth, so I won't say nothing about it to make him feel bad or nothing. Just go ahead.

Q You said Mr. Hall used to have issues eating. Can you give us an example?

A What he used to do, he borrowed -- my mother would buy a loaf of white bread. I couldn't understand it. He'd take and ball that whole loaf up in a ball and if you ain't got none, you ain't going to getting a slice of that because he would just sit there and eat all of that.

Q So, he needed supervision to eat?

A Yeah, he need supervision.

Q And he still has that problem?

A Right.

MS. AHMED: Judge, may I have a moment to

confer?

THE COURT: Sure.

MS. AHMED: Nothing further, your Honor.

THE COURT: Cross-Examination?

MR. TATTI: Yes, sir.

CROSS-EXAMINATION

BY MR. TATTI:

Q Good afternoon, Mr. Ellis.

A Good afternoon.

Q You said you are 80 years old?

A Right.

Q So you were born in 1929?

A Right.

Q And you testified that you left home when you were 16 or 17 years old?

A Yeah, I went to Lakeland.

Q You went to Lakeland. And Lakeland is what, 45 minutes, an hour away from Webster?

A About 45 minutes, something.

Q So you had your own place to live there in Lakeland?

A No.

Q No?

A I lived with my oldest sister, but I come back home every weekend. But I would go stay with her during

the week.

Q During the week, you were in Lakeland?

A Yeah, some parts of it. Now, I would stay home sometime, but I always call that my real home in Lakeland. But I be at my mother's all the time.

Q If you were born in 1929 and moved out when you were 16 or 17, that means you moved out in 1945 or 1946; does that sound about right?

A That don't sound just right. Might have been a little older, because I went in the Army September '48. I was in the home with my mother then. So I had to be older then.

Q Okay.

A Because, after that, it's when I went to stay at my sister's when I got ready to go in the Service. I be home on and off when I got my card to go in the Army and I went in the Service in '51.

Q But you would agree at the point you left home or were in the process of leaving home, that's the point at which your brother Freddie was born; is that right?

A Yeah, sometime around about.

Q So, he was an infant when you left the home? I mean, I'm just doing the math.

A No. Let me see now. When I left home, Freddie Lee was born then, because he was in the house,

because we used to get after him. But I left and went to Lakeland. But I didn't stay to Lakeland always. I moved back in the house with my mother.

Q From time to time?

A Yeah, because I stayed at my sister's about, I guess, seven or eight months or a year or something. I didn't like being in the house, then I would come back to my mom's and stayed there with my mother.

Q My point is, during that period of time, Mr. Hall, your brother Freddie Lee would have been a very small child, before school age, even, right?

A Yes, but let me tell you what happened.

Q No, I don't want you to tell me what happened. I'm just trying to figure out how old he was.

A I know. I know what you are saying. I understand what you are saying.

Q Okay. Was he a small child during that period of time?

A He was -- he was a child. He wasn't grown.

Q Okay. Now, you have described this thing with him and the loaf of bread, right?

A Right.

Q And counsel asked you if he does the same thing now. Have you sat and had a meal with him in the Department of Corrections?

A Yeah, I sit there, we brought him food. We sit at the table and eat together with him.

Q Okay. Do they bring him a whole loaf of bread?

A No, they don't buy you no bread in the corrections. They got the canteen. They let me go buy him everything he could eat. He just sit there and eat like that.

Q He likes to eat?

A That's just the way he eat.

Q Okay. Your brother has been in prison since February of 1978; is that correct?

A Right.

Q Okay. And before 1978, he was in prison from 1968 until '73 or 1974 for the thing he got convicted for in Sumter County, right?

A I remember that.

MR. TATTI: I don't have any other questions.

THE COURT: Any Redirect?

MS. AHMED: Just very briefly.

THE COURT: All right.

REDIRECT EXAMINATION

BY MS. AHMED:

Q Mr. Ellis, did you ever lose contact with your brother Freddie Lee Hall throughout his lifetime?

A No. What I was trying to explain to him, I left home when I married. And I came right back and lived right beside my mother, right next door. She lived in that house and I lived in the next house.

Q So you lived right next door to him?

A Right next door to him.

Q Did you have contact with him while he was incarcerated?

A While he was incarcerated the first time?

Q Right.

A I went to visit him I think about three times.

Q And you were still having contact with him while he's incarcerated?

A Right.

Q So you have had some contact with Mr. Hall throughout his life?

A Right.

Q So you have been able to see him and observe him throughout his life?

A Right.

MS. AHMED: Nothing further.

THE COURT: Anything else?

MR. TATTI: No, sir.

THE COURT: May this witness be excused?

MS. AHMED: Yes, your Honor.

THE COURT: Thank you for coming in today, Mr. Ellis. You are free to go about your business. If you are under subpoena, you are released from that subpoena. What other witnesses did you say you had, another relative?

MS. AHMED: Yes, Judge, James Hall.

THE COURT: Then, Counsel, after -- what other witnesses does the defense have today?

MS. RODRIGUEZ: Dr. Krop is expected to be in after lunch. He's in a murder trial this morning, your Honor.

THE COURT: What time are you expecting him?

MS. RODRIGUEZ: I was just asking the investigator. We have not heard. He's still in the courthouse in Daytona.

THE COURT: Still in Daytona?

INVESTIGATOR: I have no way of knowing.

THE COURT: But you have not heard?

MS. RODRIGUEZ: The office says he's still planning to come.

THE COURT: Counsel, do you anticipate the next witness will take about as much time as the last witness?

MS. AHMED: Yes, Judge.

THE COURT: Please call the next.

MR. NUNNELLEY: Judge, do you want me to see what I can find out about Dr. Krop's status?

THE COURT: As long as he's not waiting on us is my concern.

MR. NUNNELLEY: If he hasn't left Daytona --

THE COURT: I understand. That's why I'm not concerned. I would assume he would call once he's on the way, I would hope. And we have not heard from him, so he's at least two hours away, I'm guessing, two and a half, three.

MR. NUNNELLEY: I make that drive too often, Judge.

THE COURT: I'm sure you do. Please call the next witness.

MS. AHMED: Mr. James Hall.

JAMES HALL,

the witness herein, being first duly sworn, was examined and testified as follows:

THE WITNESS: Yes, ma'am.

DIRECT EXAMINATION

BY MS. AHMED:

Q Good afternoon, Mr. Hall. Mr. Hall? Good afternoon, sir, how you doing?

A Fine. How are you doing?

Q Fine. Can you please state your name for the

record and spell it out for the court reporter?

A I'm kind of hard of hearing.

THE COURT: That's what I was -- thank you.

BY MS. AHMED:

Q Mr. Hall, can you state your name and spell it out for the court reporter?

A Bishop James Hall, J-A-M-E-S, H-A-L-L.

Q And let me know if you can't hear me. I sometimes go back to my soft voice.

Mr. Hall, how are you employed?

A How do I . . .

Q What's your job?

A What's my driving?

Q Are you a bishop currently?

A Yes.

Q How are you related to Freddie Lee Hall?

A That's my brother.

Q How many years apart are you?

A From childhood up, just four or five years older than him, so we come up together. Until he was somewhere around 18 years of age, we lived in the same house.

Q And you had that house with your other siblings?

A Yes, we have other siblings.

Q How many children were in the house?
A At the time, it was six of us in the house, at the time.
Q When Freddie was born?
A When Freddie was born? Well, at the time, it was — there was five of us at the time.
Q And if you can, do you remember Freddie from when he was born?
A When he was born? That was 1945.
Q What was his -- can you describe to us how Freddie was as a baby?
A Well, as a baby, I was prescribed [sic] that he was a little different from the others. He wasn't really like normal. Like, you could tell there was something about him that it wasn't just a normal child, like.
Q Can you describe to us, what do you mean that he wasn't normal?
A Well, I mean he didn't act like the rest of them. He just acted different from the other children than the regular ones did or was.
Q What would Freddie do?
A What would he do? Growing up, he would be to himself most of the time. And then he would get frustrated because when he was growing up, trying to

speak, he couldn't speak. And then he would pound something, trying to get his words out as he wouldn't speak like rest of the kids could. So it would make him frustrated, so to speak, at the time.

Q So when Freddie couldn't speak, he would pound?

A Pound something, yes, trying to get his words out.

Q How long did he have this sort of problem in his kind of speaking?

A He had that problem way up until I imagine in his teens, because he still was kind of -- stutter. He had that speech, that problem in his speech, in his teens.

Q And besides his speech, do you know if Freddie had issues with reading or writing?

A Rephrase the question again?

Q Did Freddie have problems reading?

A Oh, yes, he couldn't even read. He couldn't read. No, he couldn't read.

Q And what about Freddie in terms of writing?

A He couldn't write. Nothing you could understand. Reading, writing, that was out of the question, reading and writing.

Q But he could write but, like you said, it was

nothing you could understand?

A No, you couldn't understand it, no.

Q Do you still visit your brother now?

A Do I?

Q While he's incarcerated?

A Do I live with him?

Q Do you visit your brother incarcerated?

A Yes, I do.

Q His ability to read or write, is that still the same now?

A Now, it's the same, even though he write letters. But they lay around the house for some time, because I can't read them. I know my name is on the envelope, but the writing, you can't understand it. So I don't really hardly bother about trying to read it.

Q How is Mr. Hall's speech now when you go visit him?

A He talk when we visit him. His conversation is not like ours. He can't compete with us, on this level, the level that he's on, he -- we understand him, but he don't understand us. So we just sit and listen as he talk.

Q So, he still has that same trouble?

A Yes, he had that problem, yes.

Q Now, as a child, do you know if Freddie was

able to ever bathe himself, look after himself?

A From a child, most of the older ones had to kind of stay after him, because he wasn't -- he most likely wasn't capable of doing it. We would have to kind of stay after him.

Q When he got older, was he able to do it?

A When he got older, he didn't do as he should. Pretty much the same thing, he would probably go without even taking care of himself or staying after himself a lot of time.

Q How long did this go on?

A Well, that went on until I imagine the whole time he was there, we was in the house together, the whole time.

Q Okay. And Freddie used to like to play football, too?

A Well, he'd kick in the streets. We didn't have that in school at the time. But he -- on the street side, he'd try to play football.

Q Did he know how to play football?

A No, he just know that's the name of the game, he just out there.

Q In terms -- let me go back. In terms of schooling, do you know how Freddie did in school?

A Well, in school -- you mean in his --

Q Start with the earlier years, when he first started.

A Well, in school, he wasn't — he had a low I.Q., if that's what you mean; his I.Q. was very low. He didn't -- he was just in school, I would say, just in school, not knowing like the others, he didn't -- he couldn't remember writing or — his I.Q. was so low, he was just there in school.

Q Do you know if he ever completed schooling?

A What?

Q Did he ever complete his schooling?

A No. Oh, if he did, they just put him up there. He didn't finish school, no.

Q Do you know how far he went in school?

A Well, I think somewhere around 11th grade, they got him up there somewhere around the 11th grade.

Q And at 11th grade, he still --

A No, he just moved him up to keep him from being behind and keep him with his class.

Q Do you know if Freddie has lived on his own?

A Not as I can remember living on his own. No, not as I can remember that he lived on his own.

Q Okay. Let's talk about jobs that Freddie did. What was — what kind of work did Freddie do?

A I can recall a job that he worked where I

worked at a rock mine, Florida Crushed Stone that was in Center Hill. He worked there at the rock mine.

Q What would he do in the rock mine?

A Mostly common labor, shoveling lime rock from under conveyer belts.

Q Did Freddie also pick fruit?

A Yes, he did, um-hmm.

Q Did he have any other jobs besides sort of general labor?

A Not a job. Nothing else that I can remember but the fruit and the rock mine anyway.

Q Okay. Let me ask you about Freddie and his driving skills.

A His driving?

Q Yes.

A I can't remember -- I never been in a car with him or driving or what have you. I didn't know he could even drive. I never been in a car with him.

Q He never owned a vehicle as far as you know?

A Not as I know of.

Q He never had a driver's license?

A No, no.

Q Let me go back one step. You said Freddie had those jobs. Do you know what would happen to the money he would make?

A That's the thing. I couldn't tell what he ever did with his money. He'd get paid, like, on that Friday, and he'd be broke the next day. Otherwise, he give his money away mostly, just give it away somehow. He'd be broke.

Q Okay. Let's talk about Freddie, how he would interact with other people. Was Freddie shy? Did he have a lot of friends?

A Was he shy?

Q Yeah. When he was young, did he have friends his own age, or were they younger? Talk to me about that.

A You mean in his younger days, how did he respond or whatever?

Q Yes, sir.

A Well, I can recall in his younger days, coming up, he mostly would be to himself most of the time. And he'd be in an environment so none — by hisself all the time, sometimes talking to himself a lot of times. I recall most of the time, he would be sometime around with the -- we had chickens and hogs. He'd be around the animals most likely, but being around us, he never did just be around us, he be to himself most of the time.

Q Did that change as he got older, into his

teenage years?

A As he got older, he never did -- as he got older, he never did just be with us like he would be with the rest of them. He would be to himself most of the time.

Q Now that you are visiting him in prison, is he still that way?

A Well, he had an alternative then. We together there, just sitting and talking. As we sit and talk, he can't compete with us. His I.Q. level that we understand -- what we do, we just listen at him and talk to him. But a lot of things he don't understand. So we know. We're aware of that. So we just sit and listen at him.

Q Does he ever make sense?

A Some things don't even make sense, what he be talking about. Sometimes he get his Bible and try to quote scriptures from his Bible. And I know the things he talk about don't even make sense, it's just something just to be talking about the Bible because he know I'm in that field. So he just be talking about the Bible but not knowing what he be talking about.

Q Okay. Could Freddie ever cook for him?

A Ever do what?

Q Could he ever cook for himself, food?

A He couldn't cook, he couldn't cook.

Q So his mother or the rest of the brothers and sisters would have to help him?

A Yes, right.

Q Just like they would have to help him get bathed and get clothed?

A Right. Yes, right.

Q Did Mr. Hall always live in his mom's house? He always lived in his mother's house?

A Yes, right.

MS. AHMED: Judge, may I have a quick moment?

THE COURT: Sure.

MS. AHMED: Judge, I have nothing further.

THE COURT: Cross-Examination?

MR. TATTI: Briefly, your Honor.

CROSS-EXAMINATION

BY MR. TATTI:

Q Good afternoon.

A Yes, sir.

Q You said your brother Freddie worked with you at Florida Crushed Stone in Center Hill; is that right?

A Right.

Q What did you do there?

A I was a operator.

Q And he worked there?

A As doing common work.
Q A laborer?
A Right.
Q And your brother Lugene, he picked fruit mostly for a living, right?
A Yeah, right, contracted out.
Q And you knew your brother worked with him picking fruit; is that right?
A Yeah, um-hmm.
Q Now you are aware that Freddie Lee Hall has been in prison since February of 1978 --
A Right.
Q -- is that correct?
A Right.
Q That's more than 31 years?
A Right.
Q Next February, it will be 32 years that he's been in prison?
A Yes.
Q How many times have you seen him?
A Many times, I can't recall.
Q How often do you go?
A I was just there about a month ago.
Q A month ago. Okay. How many times did you see him this year?

A This year, two or three times or more.
Q Two or three or more. Four?
A Maybe.
Q Maybe. How about the year before that?
A The year before that, I can't recall. But we just go so often to see him.
Q Okay. Every two or three months, something like that?
A No, I couldn't say every two or three months, but I know we would go see him because, personally, I go as I travel around the country. I do go to different places as my ministry and I go when I get the chance.
Q Okay. So if you are heading up in that direction of the state, you will stop and see your brother?
A We'll stop and see him every so often, me and my brothers and sisters will get together. But I can't give you the exact time.
Q In the neighborhood of two, three, four times a year?
A I assume that.
Q And that's been since February of 1978?
A Oh, yes, right.
Q Now, when he would come back and have court and he'd be at the Sumter County jail, you could see him

all the time; is that right?

A Yeah, when he come, when he come.

Q While he's been in prison, your visits have been limited?

A In the prison, it was limited, yes.

Q And you know he was in prison from 1968 until 1974 or 1975; is that right?

A Yes.

Q Did you go visit him in prison when he was in prison the first time?

A Yes.

Q How often?

A I can't recall how often.

Q That was a long time ago?

A Yeah, I know.

Q All right. Now, would it be fair to say that before your brother was convicted in February of 1978 and went off to prison, that your opinion of him is that he could not read or write?

A He couldn't.

Q But he does write you now, doesn't he?

A He writes something that I can't understand.

Q You can't read it very well, but it's words?

A No, I can't.

Q But it's words. I mean, he makes an attempt

to write you letters, and your problem with it is his handwriting; is that right?

A It understanding whatever he writes. You can't understand it.

Q And you know now he can read, isn't that true?

A I don't know that. He can't -- he can't read.

Q He can't read?

A I don't think he can read.

Q So, he doesn't read to you out of the Bible that he's showing you?

A No. He try to quote scriptures.

Q How does he do that?

A I don't know. He tries to quote scriptures.

Q He tries to quote --

A What he think in the Bible.

Q What they mean?

A I know.

Q I know you know what they mean. But he tries to tell you that he understands what a particular scripture means?

A Yeah.

MS. AHMED: Objection. Judge, speculation as to what the client's thinking.

THE COURT: It's Cross-Examination, Counsel. He may lead. Overruled.

BY MR. TATTI:

Q So, he quotes scripture from the Bible to you and then talks to you about what he thinks it means?

A It's scripture that he quote. It's not written -- as I said a few minutes ago, it's not really synonymous to what I know about scripture.

Q Okay. All right. Have you ever seen his cell?

A Have I ever seen him?

Q His cell, the place where he sleeps every night?

A No.

Q Do you know whether or not he has books in his cell?

A No.

Q But when he come -- you come to visit him, he will have a Bible in his hand a lot of the time, right?

A When we come to visit him, we sits inside. And they got Bibles there inside the place where we visit him.

Q Oh, okay. So he'll reach up and grab a Bible?

A No, it's not a Bible off the shelf. We have it already --

Q Okay. But you don't know what he has in his cell? You don't know whether he has three or four

Bibles --

A No.

Q -- books of poetry, legal books, things like that?

A No. That, I don't know.

MR. TATTI: Okay. I don't have any other questions.

MS. AHMED: Judge, I have a brief Redirect.

THE COURT: Brief?

MS. AHMED: Very brief.

THE COURT: Go ahead.

REDIRECT EXAMINATION

BY MS. AHMED:

Q Mr. Hall, let's talk about the letters -- sorry. Mr. Hall, talk about letters that Freddie would send to you. Can you describe to us what would happen with his handwriting and how he wrote?

A What he said to me in his writing?

Q Does he write from left to right, or how does he write?

A I believe it's from -- all together. There would be some all together there, all over the whole page. Like a normal person would write, he start at the top of it, all most of the time. And write all over the page, on the bottom of it. As he closing, you could

understand a little of it, but you just couldn't really understand his writing. So sometimes I wouldn't even bother trying to read his letters.

Q So, he didn't write like a normal person from left to right on a page?

A No. No, my goodness, no.

Q Does he write in a sort of circular fashion? Do the words turn?

A How do he write?

Q Yeah.

A Well, he just start out writing all over — not following the lines, just all over the page, the whole page is covered with writing, so to speak.

Q And you don't know whether or not your brother Freddie Lee Hall got these scriptures from anyone else in the prison system?

A That's what I'm thinking of. That he heard other people be together talking — I don't know. But I know you can pick up a lot of scripture like that from hearing others. But I don't know whether he read that or not. But I know —

Q So he's never read anything in front of you from the jail?

A No.

Q You don't know where he is getting this

knowledge?

A I don't know, no.

Q You don't know if someone is reading it to him or --

A I don't know where he get it.

MS. AHMED: Nothing further, Judge.

MR. TATTI: Nothing, Judge.

THE COURT: May this witnessed be excused?

MS. AHMED: Yes, sir.

MR. TATTI: Yes, sir.

THE COURT: Thank you for coming in today, Mr. Hall. You are free to go about your business. If you are under subpoena, you are released from that subpoena.

THE WITNESS: Thank you, sir.

THE COURT: All right. I propose that we take a break for lunch and I would propose, I'm thinking an hour. Is there any reason that's not appropriate? Should we take more or less? Anyone want to be heard on that.

MR. TATTI: I'm here until you tell me to leave.

THE COURT: Let's come back in an hour and -- we'll make it an hour five minutes. We will come back at quarter to 2:00. And we'll see what's

going on at that time.

Please, defense counsel, try to find out where your next witness is and when he might be here. Is that your only other witness for today?

MS. RODRIGUEZ: Yes, your Honor.

THE COURT: Okay. All right. Then we'll be in recess until quarter to 2:00.

(A recess was taken.)

THE COURT: Good afternoon.

MR. TATTI: Good afternoon, your Honor.

THE COURT: Is the defense ready to move forward and call their next witness?

MS. RODRIGUEZ: Yes, we are, your Honor.

THE COURT: All right.

MS. RODRIGUEZ: The defense calls Dr. Harry Krop.

HARRY KROP, Ph.D.,

the witness herein, being first duly sworn, was examined and testified as follows:

THE WITNESS: I do.

Good afternoon, your Honor.

THE COURT: Good afternoon.

DIRECT EXAMINATION

BY MS. RODRIGUEZ:

Q Good afternoon, Dr. Krop. Would you please

state your name and spell your name for the record?

A Harry Krop, K-R-O-P.

Q And if you could state your profession, please, sir?

A I'm a licensed psychologist in the state of Florida. I am the director of Community Behavioral Services, which is a private practice of psychology. I have offices in Gainesville and Orange Park, Florida.

Q And are you board certified, sir?

A There is no board certification in psychology. But, again, I am licensed in the state to practice clinical psychology.

Q Do you currently supervise and teach any interns, residents, or fellows in the course of your work?

A Yes. I'm in — I'm an associate professor at the University of Florida in the department of psychiatry. And my involvement with the department is to consult, lecture, and supervise the forensic psychiatric fellows in certain specialty areas, such as the evaluation and treatment of sex offenders and also evaluations of individuals who are charged with first-degree murder. I also do other things like teach them psychological and neuropsychological testing.

Q Have you published any articles, sir?

A I have probably about 30 or 40 published articles either in the professionally reviewed journals or chapters in some books.

Q Have you received any recognition or rewards for your work?

A I'm not sure I've -- I was named a long time ago, when I was doing work for the Office of — actually, the Office of Disability. I was named as the — and I recognize I'm not a physician; I'm a psychologist. But they didn't have a psychologist of the year, so I was named physician of the year for certain things that I did sort of above and beyond the call of duty in their evaluations.

Q What associations or organizations do you belong or to or are you a member of?

A I belong to, I'm not sure I have a copy of my resumé or vitae here. But I'm a member of the American Psychological Association and several different organizations involved with neuropsychology and various forensic associations, as well as the association for the treatment of sexual abuse, and then several Florida organizations such as the Florida Psychological Association.

Q Do you have any subspecialty in your area of psychology?

A I started the first sexual offender treatment program, the first treatment program for sexual abuse, back in 1977. I guess that would be one specialty area of mine. The other area would be forensic psychology. I've probably evaluated 20 or -- 2,000, maybe more first-degree murder suspects.

Q How many times have you been qualified, approximately, to testify in court?

A I'm sure over 1,000, between criminal and civil cases.

Q And of the criminal ones, how many would you say you have testified in?

A Probably about 800.

Q And how has the breakdown been in terms of your representation versus defense versus state?

A It depends on the type of case. I think if you look overall, I've probably tested maybe 45 percent for the state, 55 percent for the defense. But if we look at first-degree murder cases, it's been much more for the defense, probably about 90 percent in first-degree murder cases. Primarily since I do confidential evaluations and if I -- if my opinions are not particularly helpful to the defense, then I just wouldn't be called at all. So when I do testify, it would be for the most part for the defense.

Q Dr. Krop, do you attend continuing education courses to maintain your credentials and your license?

A Yes, I'm required to do that.

Q Have you ever failed to qualify as an expert?

A The only time -- well, I was once not allowed to testify. And that was in a Federal case in the Virgin Islands, but that was in the area of witness identification, because it was deemed that that was not within the purview of my testimony. But I was not denied as an expert witness ever.

Q Have you ever been qualified as an expert in mental retardation in the courts of Florida?

A On numerous occasions. But generally, mental retardation is considered within clinical psychology. So I've testified on the issue on numerous occasions. I don't necessarily get qualified as an expert in mental retardation. Although, I actually started off my practice by -- with a contract with the Office Of -- I guess at that time, it was called The Office of Mental Retardation, and I did hundreds if not -- well, I will say hundreds of evaluations of individuals with -- now referred to, I guess, as a developmental disability.

Q Would you consider that a subspecialty of yours?

A Particularly at that time.

Q You have dealt with death penalty cases before?

A Yes.

Q Approximately how many mentally retarded individuals have you evaluated over the course of your career?

A Are we talking just within death penalty or --

Q Yes.

A Within death penalty, I'd say -- I'd say maybe of the over 2,000, maybe 75 to 100 would be tested in the area that would fall within the clinical category of mental retardation.

Q How about individuals in general?

A Maybe four or five hundred.

Q Approximately how many times have you administered the Vineland Adaptive test?

A I haven't used the Vineland in a while. I used the Vineland early on in my career, probably maybe 75 times over the last few years, I have used the Adaptive Behavioral Assessment System referred to as the ABAS.

Q Dr. Krop, I'm going to show you what's previously been marked as Defendant's Exhibit 6 for identification. It's a copy of --

MS. RODRIGUEZ: I apologize, your Honor.

(Tendering document(s) to the state.)

MR. TATTI: CV?

MS. RODRIGUEZ: CV.

(Defendant's Exhibit E [sic] identified for purposes of the record.)

BY MS. RODRIGUEZ:

Q It's a copy of a CV and ask you to look it over if you would. Is that a current and accurate version of your CV?

A It appears to be accurate. It's not the most current. I think I have revised it once since then, but rather than some updated figures, it's accurate.

Q Thank you.

MS. RODRIGUEZ: Your Honor, at this time, I would like to move Dr. Krop's CV into evidence and tender him as an expert in clinical psychology, and I would also like to tender him in the area of mental retardation, as well. The state may wish to voir dire.

MR. TATTI: I don't have any voir dire. I have no objection to Dr. Krop being recognized as an expert in clinical psychology. And I suppose to the extent that he's going to testify in general about mental retardation, that's not a problem. I do object to the introduction of his CV.

THE COURT: Any particular reason on the CV that you want to place of record?

MR. TATTI: It's hearsay, your Honor.

THE COURT: Okay.

MS. RODRIGUEZ: If I might approach, your Honor.

THE COURT: I'm going to allow it into evidence and overrule your objection as to the CV. Note your comments as to his qualifications and his CV.

(Defendant's Exhibit 2 received in evidence.)

BY MS. RODRIGUEZ:

Q Dr. Krop, can you tell me how you got involved in the Freddie Lee Hall case?

A I'm trying to do this the best I can in terms of sort of retrospectively. I evaluated Mr. Hall, or I was asked to evaluate him back in 1990, I believe. (Referring to document.) At that time, I did an intellectual assessment of him, and I -- again, I believe it was at the request of the Public Defender's Office in -- I think it was Mr. Johnson or his, Miss -- I believe it was Mr. Johnson. I think there were other public defenders working on the case. But it was Michael Johnson that asked me to get involved in the case.

Q Was this in preparation for a resentencing?
A I believe so, yes.
Q What issues were you asked to address?
A I was asked to do a general assessment of him to assess his competency, assess his mental state, specifically with regard to potential mitigating factors.
Q In addition to the initial evaluation -- that was in March 1990. Does that sound correct?
A Yes.
Q Did you see Mr. Hall on another occasion?
A I saw him, according to the records I have, originally, March 15th, 1990. Then I saw him again September of that same year, September 25th, 1990.
Q And did you conduct an evaluation?
A Yes.
Q And where did those evaluations take place?
A I would say it would either have been at Florida State Prison or U.C.I. I don't recall.
Q Can you tell me what type of evaluation you did?
A I did the evaluation as if I were starting fresh with an individual who was facing the death penalty. I recall interviewing him. I recall doing the Wechsler Adult Intelligence Scale-Revised, which

probably would have been the most current WAIS at that time. I did other neurocognitive tests. I believe I had other neuropsychological testing that had been done by other individuals at that time. I know I read several depositions. I was provided with a transcript of his original sentencing. I had other psychological reports or affidavits. I do not specifically recall, but in reviewing my report and my testimony, I see that I also interviewed several family members.

Q Did you do a WRAT-R?

A I probably -- yes, according to my report.

Q What is WRAT-R?

A Wide Range Achievement Test-Revised.

Q What does that measure?

A It's a basic achievement test assessment which measures a person's reading level, spelling skills, and arithmetic levels.

Q Did you perform a Wechsler Memory Scale?

A Yes.

Q What is a Wechsler Memory Scale?

A Wechsler Memory Scale would have been administered as part of the neuropsychological test battery to assess a person's immediate as well as remote memory.

Q Did you administer a Rey Auditory-Verbal

Learning Scale?

A Yes, that would be another measure of a person's memory and learning abilities.

Q Did you administer a Bender-Gestalt Test?

A Yes.

Q And what is a Bender-Gestalt?

A Bender-Gestalt is a -- well, it used to be used as an assessment of organic brain damage. It's really simply a measure of a person's perceptual motor skills. It's usually a part of a total neuropsychological battery.

Q Did you administer Right-Left Orientation, Finger Tapping Test?

A Yes, those would be two different tests. Finger Tapping Test is a measure of a person's fine motor skills. And the Right-Left Orientation is part of measuring a person, whether he has any kind of aphasia or disorientation kinds of issues. Again, it's seen as part of a total neuropsychological battery.

Q And the finger localization test was administered, as well?

A Yes, that's also a measure of — it's also an assessment in a neuropsych battery.

Q I believe you mentioned that you had other reports, as well. Do you recall what reports and

testing materials you had?

A In looking at my report dated January 8th, 1991, and I noted that I had a report by Dr. Lewis, a report by Marilyn Feldman, a report by Dr. Kathleen Heide, a report from Dr. Jonathan Pincus. A report by Dr. Jethro Toomer; a report by Dr. Barbara Bard; a report by Leslie Prichep, P-R-I-C-H-E-P; several affidavits Dr. Barnard, James Hill, Katie Glenn, Diana Mitchell, dash, Rigby -- or Rigsby (phonetic). I also had an affidavit by the public defender Mr. Babb, and an affidavit by Richard Hagin (phonetic). I also reviewed other legal documents, various police reports, as well as Mr. Hall's school records.

Q You reviewed the trial testimony as well?

A Yes, as well as his DOC records, medical and administrative, which would be the classification records.

Q I believe you discussed some interviews you did with some family members?

A Yes.

Q Do you recall who those family members were?

A His oldest sister, Ethel Miller. I interviewed Katie Mae Glenn, who is also a sister. His brother James Hall. Deana Rigsby, his sister, and the Henry Ellis, who is another brother.

Q Are all those type background materials the ones you reasonably rely upon or experts in your field rely upon in conducting such evaluations?

A Yes, ma'am.

Q Were the other mental health professionals' reports important to you?

A Well, certainly, if I'm looking -- again, the issue was more of a general one at that time in terms of potential mitigating factors to be explored. So, yes, any prior psychiatric records or prior assessments would be relevant in my overall evaluation.

Q How much do you rely upon those other reports when you are doing an evaluation?

A It varies. It varies in terms of, for example, I look at it in terms of the history obtained and was the history obtained consistent with the history I obtained? I look at the qualifications of the persons doing the report. I look at the tests and whether they are the kinds of tests that I would also rely upon as far as my overall opinion. So it really varies from one report to another.

Q What did the previous psychological tests show Mr. Hall's functioning range to be?

A I think at that point, there were — I know I made some notes. I note that there was a evaluation

that was done in 1986 by a Marilyn Feldman, and she got an I.Q. of 80. (Referring to document.) I believe there were other reports that, for example, Dr. Heide, who is not a psychologist, and she did family interviews. Dr. Toomer, I don't recall him giving a specific I.Q. or doing a full test, but he did give an opinion that there was probably brain damage. The same thing by Dr. Lewis and her team.

So there were I.Q. tests that were in his records, I believe, but there were also some testing that was done by the people that I had reviewed their reports.

Q Were the tests administered by Dr. Lewis individually administered?

A Well, Dorothy Lewis is, I believe, a psychiatrist. But I think she had a team, and it looks like they were individually administered tests. But I'm really not sure.

Q You administered a WAIS-R, I believe you said?

A Yes.

Q If you will briefly state, what is the WAIS-R and what does it measure?

A Well, at the time -- the Wechsler scales have always been recognized pretty much as the -- probably the most relevant and best researched of all the tests

to give global assessment of a person's intellectual functioning because it measures both verbal and nonverbal areas. Then all the Wechsler scales have -- I'm sorry. All the Wechsler tests have subtests which measure specific areas of functioning. At the time, the WAIS-R probably was the third test, third revision. Even though there is a WAIS-III, the WAIS-R was a revised version of the original WAIS at the time. So it's an individual intellectual assessment.

Q Did Mr. Hall appear to exert maximum effort during the testing process?

A It was my opinion that he did.

Q And did the results you obtained appear to be a valid estimate of his true intellectual ability?

A They did, yes, at the time.

Q Is there a standard within the medical practice of the psychiatric community for the diagnosis of mental retardation?

A Well, yes. I mean, there has always been a specific standard, a specific criteria. The Diagnostic and Statistical Manual has always divided up, as does the Wechsler tests, different levels of mental retardation with certain cutoff points in terms of the different levels and degrees of mental retardation.

Now the Diagnostic and the Statistical Manual

pretty much currently goes by the Developmental Disabilities Foundation as far as the criteria for a diagnosis of mental retardation. There has always been -- it's always been important to distinguish between a diagnosis of mental retardation and the person's functioning level in terms of his intellectual functioning level. So we've always known that a person can function at a mentally retarded level based on I.Q. testing. But in terms of a diagnosis of mental retardation, that always, at least for as long as I can remember, involved more than just an I.Q. test. It would also involve an adaptive functioning assessment and also the determination that the mental retardation existed prior to the age of 18. So there has always been a distinction between the clinical level of functioning and a diagnostic definition of mental retardation.

Q Are you familiar with the definition for mental retardation that's contained in Florida Rule of Criminal Procedure 3.203?

A If that's the one that was applied, I guess, in the *Cherry* case, I would be familiar with it. I don't know the number.

Q And what is it?

A Well, it's somewhat similar to the Diagnostic

and Statistical Manual definition with the exception of, rather than the I.Q. score having some -- or the examiner, I guess, having some flexibility with regard to the diagnosis based on an I.Q. score, which is plus or minus whatever the standard deviation or standard error of measure is on the test, my understanding from a legal standpoint is that the score has to be 70 or I guess below 70, as opposed to a particular I.Q., which may be plus or minus, let's say, five points.

Q And is that different than what's directed in the — in your statistical manuals?

A Yes. As I said, in the DSM, which is based on developmental disabilities criteria, the diagnosis of mental retardation can be given with an I.Q. score which could be higher than 70 if it falls within a standard deviation of that test, or standard error of measure of the test.

Q How is the adaptive behavior defined in the rule?

A Deficits -- if I recall correctly, deficits — you are talking about the legal rule?

Q Yes, versus the DSM.

A I am not totally sure. I know the -- as I usually have applied it, it would be significant deficits in adaptive functioning in at least three areas

of a person's functioning, whether it be social, communication, vocational, academic, and so forth.

Q How long have you known mental retardation to be defined in this manner?

A In the manner that it's legally defined? Only since -- I guess since the ruling in the *Cherry* case.

Q And the clinical definition, how long has mental retardation been defined in that manner?

A Well, since I've been doing these assessments, which would be the '70s.

Q Have you evaluated other death-row defendants for mental retardation?

A I have evaluated individuals prior to -- prior to their case being -- gone to trial. And I've also evaluated, in post-conviction cases, other individuals for mental retardation.

Q How many have you --

A Post-conviction, probably three or four at this point. And, of course, pre-conviction, that would be part of a routine assessment that I was doing for possible mitigating factors, anyway.

Q How many times if you would, have you, approximately, been employed by the state versus defense on these cases? Any idea?

A Are we talking specific mental retardation

cases?

Q Yes. Sorry.

A Two of the three post-conviction, I was appointed by the Court. I wasn't hired by either side. And the other one, I believe the defense asked me to do an assessment.

Q Could you please describe for me the steps you took in conducting Mr. Hall's assessment to evaluate his intellectual functioning and the test, itself, that you gave him?

A Well, I -- again, I'm going based on some notes in my own testimony. I do recall Mr. Hall's case. And I remember specifically having some difficulty, at least initially, because he was very difficult to understand. So I would have established rapport with him. I remember that he was pretty suspicious. He was basically initially concerned about who I was working for. I don't recall that time whether I was introduced to him by the attorney. Most of the time now, I ask, if I'm hired by the defense, for the attorney to introduce me to the inmate.

But I do believe from looking at my notes that rapport was eventually established. Then I would have gone about -- usually the I.Q. testing is the first test that I administer so there is no real fatigue issue

involved.

Q Do you recall what the results of testing showed?

A The results were he obtained a verbal I.Q. of 70, a performance I.Q. of 79, and a full-scale I.Q. of 73.

Q Now, based on the DSM-IV-TR and your experience and training, are full-scale I.Q. test result scores approximate figures?

A Yes, that's why there is a standard error of measure. And also, of course, you look at standard deviations, but they're approximate in terms of we take into account that the person -- there might be some conditions or circumstances that might cause the person to do worse than he is potentially capable of doing. And there may be some problems in terms of the administrator, things like that. So, in that sense, they are approximate, but they are considered reliable instruments.

Q Why is it recommended to take the standard error of measurement into account when evaluating these intelligence scores?

MR. TAITI: Your Honor, I'm going to object to the relevance of this. It's theoretical. The questions have no relevance to the inquiry being

made by the Court at this point based on the law as it exists in Florida.

THE COURT: Counsel, why should the Court allow this? It does seem to be outside the standards required in the case law and in the ruling statute.

MS. RODRIGUEZ: Your Honor, I'm questioning the witness as to the clinical evaluation of the defendant that was performed when he visited with him and gave him the test. And the way he performed the test was not in accordance with the rule; he did a clinical evaluation of the defendant. So the questions pertain to that particular evaluation of the defendant in 1990.

MR. NUNNELLEY: The test is the test.

MS. RODRIGUEZ: And the DSM, your Honor, the language in terms of the standard error of measurement is actually in the DSM language. So the questions are merely directed to the witness as to his evaluation that he conducted at that time.

MR. TATTI: And my response is the witness has already indicated that he understands there is a difference between the standard in the law and the standard described in the DSM. And to the extent we've ventured past the standard that is relevant

here, that is the standard of the law. This is irrelevant.

THE COURT: I agree. I will sustain the objection.

BY MS. RODRIGUEZ:

Q What is a confidence level?

A Confidence level takes into consideration probability that the score that's obtained falls between a -- two scores. In other words, one that's typically lower than the score obtained and one that is typically higher than the one obtained. So, basically, there are scales in the test that show that — let's say, that have a 95 percent probability or confidence level, the score that you obtained — or that this person, if he or she is tested again -- would fall between score A and score B.

Q Dr. Krop, what did you state as your findings related to Mr. Hall's I.Q. test scores?

A Well, I described him as being functionally retarded at the time. That was based on a combination of my I.Q. testing, my review of records, and my interviews with family members that showed that he had difficulty in almost all areas of his life in terms of adaptive functioning, school, occupational, social, involvement in criminal activity, and so forth.

So, at the time that I testified, I indicated that I thought he was -- he would meet criteria for functional retardation. I also indicated that I thought he had a mental age of around 13, I believe at the time. And that was based on the I.Q. test score that I obtained.

Q In your review of Mr. Hall's background information you were provided copies of the resentencing proceedings and reviewed that information?

A Yes.

Q Including the school records I believe you testified?

A Yes.

MR. TATTI: Just to clarify, I believe Dr. Krop testified in the resentencing proceedings. So he wouldn't have had access to a transcript of something that occurred after his report. It would have been the original trial proceedings.

THE COURT: Yeah, I think he's talking about the original trial proceedings.

BY MS. RODRIGUEZ:

Q Well, in preparing for your testimony today, were you given an opportunity to review the sentencing proceedings?

A Yes, that's what I thought you meant with your

question. As I sit here today, I have reviewed the transcript of the sentencing and the resentencing.

Q And after completing your evaluation, Dr. Krop, were you able to give an opinion within a reasonable degree of medical certainty as to mitigating factors that existed in Mr. Hall's case?

A First of all, it would be psychological certainty. But --

Q Yes, I'm sorry.

A I -- as a rule, I do not indicate that what I'm testifying for is, quote, mitigating factors. What I would do is testify with regard to my clinical impressions, my finding, my diagnosis, and then basically it would be up to the trier of fact to determine whether something is mitigating or not.

Q And what was that opinion?

A Well, one of the opinions I recall was that he was functionally retarded. I believe also there was evidence to suggest that there was likely what I would refer to as neurocognitive impairment, which is support of equivalent to possible brain damage. I certainly testified to other issues that is not necessarily related to the retardation issue in terms of his abusive family and disfunctional family and so forth.

Q Are speech impediments an example of adaptive

functioning deficits?

A Sure.

Q Would limited social skill and impaired self-concept also be examples of deficits in adaptive functioning?

A Yes.

Q Now, you testified with regards to Mr. Hall and did you -- do you recall any mental illness being involved in this case?

A There certainly was suggestions of mental illness. And, I believe, I diagnosed him as having a schizotypal personality disorder. By that, I meant that depending on, in certain circumstances, in terms of stress, that he could become psychotic. At the time that I evaluated him, I did not feel that his suspiciousness or unusual thoughts -- he had some unusual thoughts regarding rooting (phonetic) and some other religious ideations, but I did not feel that he was psychotic at the time that I evaluated him.

Q Dr. Krop, can a person be mentally ill and also mentally retarded?

A Sure.

Q Having reviewed all of the testing and history in Mr. Hall's case, are the test scores obtained by the various mental health professionals consistent with your

findings?

A I think all of the scores, with the exception of one that was done by a student, Marilyn Feldman -- all of the test scores that I have reviewed have fallen within the range of mental retardation in terms of a clinical assessment.

MS. RODRIGUEZ: Thank you, Dr. Krop. I have no further questions.

MR. TATTI: May it please the Court?

THE COURT: Yes.

CROSS-EXAMINATION

BY MR. TATTI:

Q Dr. Krop, I may have misspoke. You did not testify in the resentencing proceeding in 1991, did you?

A I don't believe so. I believe I testified at an evidentiary.

Q In a 3.850 proceeding that occurred in 1997?

A That's correct.

Q And you were asked questions about the evaluation you did prior to the resentencing proceeding --

A Yes.

Q -- in the early '90s?

A Correct.

Q Okay. But you did not appear and testify in

the resentencing?

A Correct.

Q And just so we're also clear, the full-scale I.Q. that you obtained as a result of your testing of Freddie Lee Hall in March and September of 1999 -- I don't know which of those two dates you gave him the test. Do your records reflect when the test was administered?

A I don't think they do. And I don't have my original notes. I am presuming that I would have administered the I.Q. test the first time I saw him.

Q So that would have been in March of 1990?

A Yes.

Q And the results of that testing, using a Wechsler Adult Intelligence Scale-Revised, the revised version of the test was a full-scale I.Q. of 73; is that correct?

A Yes, sir.

Q And the test that you refer to that you had -- or report that you had been provided from the student was a student by the name of Marilyn Feldman; is that right?

A Yes, sir.

Q And she administered the same Wechsler test, did she not, according to her report?

A Yes, four years earlier.

Q A WAIS-R?

A Correct.

Q Which, at that time, would have been, for lack of a better word, the state-of-the-art in terms of Wechsler's intelligence tests?

A Most likely, yes.

Q And she obtained a score of 80, full-scale I.Q.; is that correct?

A That's correct.

Q Now, the general questions Ms. Rodriguez asked you with regard to the diagnosis of mental retardation and treatment and clinical perception of the idea of mental retardation, you are aware, are now different than what the Florida Supreme Court says is relevant to Florida law with regard to the death penalty; is that correct?

A I'm familiar with that, yes.

Q You understand that the Florida Supreme Court has very clearly announced that in order to be considered mentally retarded under Florida law for the purposes of the death penalty, administering the death penalty, that an I.Q. has to be at 70 or below?

A I am familiar with that, yes.

MR. TATTI: I don't have any other questions.

MR. NUNNELLEY: Wait, wait.

MR. TATTI: Excuse me, your Honor.

MR. NUNNELLEY: Give us just a minute, Judge?

THE COURT: Sure.

MR. TATTI: I don't have any other questions, your Honor.

THE COURT: Okay. Redirect?

MS. RODRIGUEZ: A moment, your Honor?

THE COURT: Okay.

MS. RODRIGUEZ: I have nothing further, your Honor.

THE COURT: Nobody has anything further for Dr. Krop?

MR. TATTI: No, sir.

THE COURT: May Dr. Krop be excused and released from his subpoena?

MS. RODRIGUEZ: Yes, your Honor.

MR. TATTI: Yes, sir.

THE COURT: Thank you for coming in, Dr. Krop. You are free to go about your business. If you are under subpoena, you are released from that subpoena.

THE WITNESS: Thank you.

MS. RODRIGUEZ: Your Honor, we have no further witnesses today.

THE COURT: Okay. Let's talk again about what you have coming in -- who you have coming in tomorrow and when they are scheduled to arrive. And please check back with them, because we need to get going right at nine o'clock tomorrow.

MS. RODRIGUEZ: Dr. Prichard, your Honor, should be here first thing in the morning. And we let him know what time we're starting. We expect to see him tonight. He'll be here overnight so we should be on time tomorrow.

THE COURT: Nine o'clock tomorrow.

MS. RODRIGUEZ: That is our final witness.

THE COURT: And then the state can decide whether they wish to call any witnesses.

MR. NUNNELLEY: If we do, they will be here timely, your Honor.

THE COURT: How long do you think Dr. Prichard would be on the stand -- how long would your part take?

MS. RODRIGUEZ: I would say an hour, your Honor.

THE COURT: So it's up to the state what they wish to do. But you expect to be able to rest including Cross-Examination, let's say, after -- say two hours tomorrow?

MS. RODRIGUEZ: Oh, yes, your Honor.

THE COURT: All right. Okay.

MR. NUNNELLEY: Judge, the only comment I have -- you know, I'm not sure -- you know, if Dr. Prichard testifies consistently with his report, which he best or he's going to have some problems for certain, that's going -- that testimony will be that Mr. Hall has a full-scale I.Q. of 72, I believe it is -- 71.

THE COURT: Three is what was -- oh, okay in that report.

MR. NUNNELLEY: Krop had a 71.

THE COURT: 73 for Dr. Krop.

MR. NUNNELLEY: 73, 71.

THE COURT: Over 70.

MR. NUNNELLEY: Over 70. I'm a little confused of what the benefit of a live witness is going to be in this circumstance. I mean, it's not going to get any better for them, I don't see. And I don't know why we can't -- I don't know what we're supposed to do. It makes no sense the way we are. The evidence on its face shows that the defendant does not meet criteria for mental retardation under *Cherry* and the applicable statutes.

MS. RODRIGUEZ: I will only state on the record that Dr. Mosman testified --

MR. NUNNELLEY: We're going to object to that, your Honor. Dr. Mosman is dead and not subject to Cross-Examination.

MS. RODRIGUEZ: Your Honor, I would like to have an opportunity to address the Court without the interruptions, if I might. Dr. Mosman's records were reviewed by Dr. Prichard. So when Dr. Prichard testifies, he has to testify with regard to all of the reports that he reviewed in rendering an opinion. That is our last witness that we intend to call tomorrow. We should have an opportunity to call Dr. Prichard, since the motion itself was filed with Dr. Prichard's report, and that's the basis for being before the Court.

So I think the Court has already ruled on the motion from the state. And I think the state is trying to further limit the defense's ability to put on the evidence. I don't think that there was a question with regard to Dr. Prichard testifying in this case.

THE COURT: Well, I mean you have not rested; you can call whichever witness you want. The state knows the rules, and they are fully capable of

objecting if they think it's --

MS. RODRIGUEZ: I would agree, your Honor. But this argument I would say is premature.

THE COURT: It's clearly premature, although I understand where they are coming from. They are trying to put everybody on notice of what they anticipate. That's appreciated, and we'll deal with it when it comes up.

MS. RODRIGUEZ: We're not sure ourselves with regard to Dr. McClaren and whether or not we should prepare this evening for the Cross-Examination of Dr. McClaren coming in tomorrow.

THE COURT: If you wish to ask them a question, either on the record or off the record, that's fine. And it's up to them whether or not they wish to answer. I'm sure if they do answer, they will tell the truth, but otherwise -- and if you want it now, that's fine. If you don't, you can ask them --

MS. RODRIGUEZ: Well, they certainly have the prerogative to call the witness, your Honor --

THE COURT: Of course.

MS. RODRIGUEZ: So I would not ask the question.

THE COURT: Is there anything else either side

wants to bring to the Court's attention before we recess for today?

MR. TATTI: No.

MS. RODRIGUEZ: Nothing from the defense, sir.

THE COURT: All right then. We'll recess for today, resume tomorrow morning at 9 a.m. sharp.

Court is in recess until tomorrow morning at 9 a.m.

(Whereupon, court was adjourned until 12/8/2009 at 9 a.m.)

IN THE CIRCUIT COURT OF THE FIFTH
JUDICIAL CIRCUIT OF THE
STATE OF FLORIDA IN AND FOR HERNANDO COUNTY

SUMTER COUNTY CASE NO. 1978-CF-00052-A

STATE OF FLORIDA,

Plaintiff,

vs.

FREDDIE LEE HALL,

Defendant.

_____/

VOLUME II
Pages 134 - 302

PROCEEDINGS: EVIDENTIARY HEARING.

DATE: December 8, 2009.

TIME: 9:08 - 12:59 p.m.

BEFORE: RICHARD TOMERINK, JR.
Circuit Court Judge

PLACE: Hernando County Courthouse
20 North Main St.
Brooksville, FL 34601

REPORTED BY: Patti Marshall, RPR, FPR
Notary Public,
State of Florida at large.

APPEARANCES:

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(Held in Open Court:)

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Thereupon, the following proceedings were had and taken in regard to the above-styled case out of the presence of the defendant:)

THE COURT: Good morning.

MR. TATTI: Good morning, Judge.

MS. RODRIGUEZ: Good morning, your Honor.

THE COURT: Are there any matters that either side wishes to take up with the Court before we call our next witness?

MR. TATTI: Yes, sir.

MS. RODRIGUEZ: Yes, your Honor.

MR. TATTI: I will let her go first.

THE COURT: Ladies first.

MS. RODRIGUEZ: Very briefly. Yesterday, we represented to the Court that we would be filing a document on the judicial notice that specifically would list for the Court the parts of the record that would be reviewed. We have shown this to the state. We do have copies for the state of all the documents that we're referring to in this motion before the Court and we'll be providing them to the state. And we have filed this with the Court.

THE COURT: You also have copies for the Court?

MS. RODRIGUEZ: Yes, your Honor.

THE COURT: Because, like I said, I don't even have the file.

MS. RODRIGUEZ: We do, your Honor. I apologize to the Court. I'm out of breath this morning. It comes with old age.

MR. TATTI: Judge, I don't have a problem at this point with her filing the motion. But I would ask an opportunity to re-address it later when I have an actual opportunity to look at the documents themselves. Because looking at the record citations, I don't have a recollection such that I can tell what part of the resentencing they relate to.

THE COURT: You can't tell? You don't know what's on each page of that?

MR. TATTI: No. There may have been a time in my life that I could do that, but I'm well past that time now.

THE COURT: I don't see that as a problem. I'm not sure yet where this thing is going to go and where it's going to end up. But I don't see a problem either way at this point.

(Defendant's Exhibit G identified for purposes of the record.)

MS. RODRIGUEZ: Your Honor, a second item that

I did show the state is we prepared an exhibit for the clerk to mark with regards to the documents that were reviewed by Dr. Prichard in preparation for his testimony today. We felt, because of the voluminous records, it would be to the witness and the Court's advantage to have those pulled, as well. We've listed it as a proposed Exhibit 7 on our list, and I'm asking the clerk to mark this so that we can have all of the documents that Dr. Prichard reviewed in one place.

THE COURT: Any problem?

MR. TATTI: I don't have an objection to it being marked at this point.

THE COURT: Sure.

MR. TATTI: But in terms of at the point that it is offered into evidence in this proceeding, I have a specific objection to at least one of the documents in there. And that would be the report dated November 19th, 2001, from an individual by the name of Bill Mosman, a psychologist who apparently evaluated the defendant in 2001.

My objection is this, your Honor: Apparently, Dr. Mosman evaluated Mr. Hall outside of any pending litigation. In 2001, this matter was not before the Court on the defendant's motion under

the rule or under the new statute. In fact, I'm not -- the rule didn't exist, I know. I'm not sure the statute did. In 2001, I'm not sure exactly what the status of *Adkins* was in 2001. But it's outside of any litigation relating to Freddie Lee Hall.

MS. RODRIGUEZ: Your Honor —

MR. TATTI: Dr. Mc- --

MS. RODRIGUEZ: I'm sorry, I thought you had concluded.

MR. TATTI: No, not even close.

MS. RODRIGUEZ: I thought you were raising the objection at the time that we offered the materials.

MR. TATTI: I want the ruling now, because it relates to Dr. Prichard's testimony, as well.

Your Honor, Dr. Mosman has never appeared in court, to my knowledge, to testify regarding Freddie Lee Hall and his evaluation of Freddie Lee Hall and, thus, he has never been subject to Cross-Examination.

Prior to this proceeding, I was provided a copy of a report, apparently authored by Dr. Mosman, dated November 19th, 2001. However, I received no raw data, no test instruments. I

didn't get -- I didn't get any of Dr. Mosman's notes. I have no background material in support of Dr. Mosman's report. Dr. Mosman is dead. Dr. Mosman is not available for me to depose, much less cross-examine at this juncture. It would be patently unfair through the exception that would allow Dr. Prichard to testify based on another expert's work, to rely on an opinion of this nature, given the fact that the state has absolutely no opportunity to address or rebut it, much less a fair opportunity to address or rebut it.

And, therefore, I would interpose an objection to the Court's consideration of Dr. Mosman's report. It is hearsay in its rankest form. And I submit that despite the fact that the rules of evidence would ordinarily allow Dr. Prichard to testify about another expert's report, I submit under 403, the danger of prejudice here far exceeds any probative value in having Dr. Prichard repeat what he read from Dr. Mosman's report, given my inability to address it at all at this point.

MS. RODRIGUEZ: Your Honor, Dr. Mosman's report was made known to the state quite some time ago.

THE COURT: Well, what --

MS. RODRIGUEZ: In 2003, your Honor, the report was authored by Dr. Prichard. Dr. Prichard at that time relied upon and talked about, in of his report of 2003, the fact that Dr. Mosman had concluded and done an evaluation giving a full-scale I.Q. of 69 to Mr. Hall. That was never secret and always part of the litigation. The state never took the opportunity to depose either Dr. Prichard or to seek to talk to Dr. Mosman. Not anticipating, quite frankly, this objection, I don't have the date of death as far as Dr. Mosman is concerned. But I would suggest to the Court that there may have been an opportunity at that time for the state to speak with Dr. Mosman himself.

As far as the raw data and raw materials and any of that information, that has never been requested by the state. I'm not even certain that we have any of that material, because it goes expert to expert. And it may be in the possession of Dr. Prichard, but not anticipating this objection today, your Honor, I wasn't able to consult with Dr. Prichard to see what he does or does not have with regards to Dr. Mosman.

That being the case, Dr. Mosman was a licensed clinical psychologist in the state of Florida and also a lawyer, licensed by the Florida Bar. He did not give a legal opinion, however, Dr. Prichard is certainly entitled to rely upon the report and evidence in the record in terms of what he did and what he reviewed in making his own diagnosis in this case. And that would be my response to the state with regards to this objection.

MR. TATTI: Just briefly. I did specifically request all raw data that would have been provided to Dr. Prichard in a motion to compel that, I believe, was filed in 2005. And as a result of that motion, I received a great deal of information. But I did not receive any raw data that appeared to relate to Dr. Mosman's report. That was Court ordered, that I was entitled to that material. And I didn't get it.

MS. RODRIGUEZ: With all due respect, your Honor, I was not the counsel of record at the time, but I would represent to the Court, again, that Dr. Prichard's report is dated February 4, 2003. On that report, specifically inside this report, there is reference to the various experts that he relied upon: Dr. Krop, at page 12, your Honor;

midway, Dr. Bill E. Mosman conducted an evaluation of Mr. Hall and the date listed is November 19, 2001. And it goes into a description of all of the tests that were performed and the opinion that he obtained, including the fact that he is mentally retarded and full-scale I.Q. score.

As far as the state not being on notice, I would object to that representation today before the Court -- or having had an opportunity to address this issue before February 4th, 2003.

MR. TATTI: Your Honor, I never indicated I wasn't on notice. I'm entitled to wait to see what it is she's going to present. She handed me the documents that she just had marked that were the materials she said Dr. Prichard reviewed. There is no raw data in that material either. I obviously wouldn't be in the same position to make this complaint if such documents existed and I had an opportunity to review them. I might be in a position, if I had that, to ask for a delay of some minor -- so that my expert could look at that material. But the fact of the matter at this point, on December 8th, 2009, I have absolutely no means to rebut or address the hearsay testimony regarding Dr. Mosman's report. And there is no

other source for that information. And that is the basis for my objection. I did everything I could to get the information that Dr. Prichard relied on for Dr. Mosman. Dr. Mosman's name was never on the defendant's witness list; it's always been Dr. Prichard.

So I assume the conduit for Dr. Mosman's report would be Dr. Prichard. So today, I discover that there is no more than what I received, which is a typewritten report. And your Honor, that's simply unfair to -- to allow Dr. Prichard to testify about a report from a clinician who is deceased and cannot be cross-examined.

MS. RODRIGUEZ: Clinicians die all the time, your Honor. And experts are allowed to rely on that particular evidence -- I'm sorry, your Honor, I can't concentrate.

THE COURT: Just wait.

MR. NUNNELLEY: We're entitled to converse, your Honor.

THE COURT: Apparently, it was loud.

MR. TATTI: Sorry.

THE COURT: Go ahead.

MS. RODRIGUEZ: Clinicians are permitted, your Honor, to rely upon the expert opinion of other

clinicians. In this particular case, the state never requested when this Court appointed an expert, and the expert looked over all of these materials, including the report submitted by Dr. Prichard -- there was no request for any raw data.

Dr. McClaren did not test Mr. Hall, to my knowledge. The state's not planning to call this expert, or at least made that representation before the Court yesterday, so it's difficult for me to understand the prejudice and the unfair advantage, if you will, that the defense has taken in this particular case because they don't have the raw material. The raw material would not go to the attorney. It would go directly to their expert. It's expert to expert, is what we've heard and what we've been told by our experts. And Dr. Prichard would have shared that information directly with Dr. McClaren.

As I stand here now, I do not know, your Honor, whether that was done or not done, whether Dr. McClaren picked up the phone and called for it, because usually that's what happens, and they will exchange information. It doesn't go through the lawyer, not the raw material data. That's how it's

worked since I've been at CCRC. So I cannot answer that question.

But I can state to the Court that the state's not prejudiced. Certainly Dr. Prichard should be permitted to testify. And the defense would not be opposed if they wish to call McClaren at another point in time and look over the materials, to have him come and testify.

MR. TATTI: Your Honor, January 12th, 2005, your Honor presided over a case management conference on this case. As a result of that case management conference, an order was issued by your Honor dated February the 1st, 2005. During that case management conference, I moved ore tenus to appoint Dr. McClaren to assist the state, and advised the Court at that time that I had no expectation at that point that Dr. McClaren was going to evaluate Mr. Hall. Simply, I wanted him appointed to assist me.

I also moved at that time to compel the defendant to produce all of the raw data attendant to Dr. Prichard's report, as well as any raw data that came with the reports that were given to Dr. Prichard. As a result of my motion, the Court entered an order. Beginning at Paragraph 2, the

order says, The state's motion to compel and motion for appointment of expert witness --

THE COURT: What's the date of this order?

MR. TATTI: February 1st, 2005 -- is granted, paragraph (a): The defendant is hereby directed to provide the following documents and materials to the state within 30 days, on or before Friday, February 11th, 2005: One, copies of any and all raw data and notes associated with the psychological evaluation, slash, assessment of the defendant by Dr. Gregory Prichard, including any and all psychological tests and answer sheets.

Two, copies of any and all written or recorded material provided by the defendant to Dr. Prichard or independently obtained by or on behalf of Dr. Prichard.

And three, copies of any and all psychological or psychiatric reports provided to Dr. Prichard including testing material, raw data, and notes associated with the said reports.

The suggestion that I didn't ask for this is erroneous, your Honor. I not only asked, your Honor ordered it in 2005.

MS. RODRIGUEZ: Your Honor, I'm not disputing the fact that they are entitled to the material.

I'm not disputing that at all. I'm suggesting to the Court that there was a different counsel in the case. He would have picked up the phone and called Dr. Mosman and had Dr. Mosman send it directly to Dr. McClaren, because it does not come through the attorneys. The only way I would know that it had not been received is if the state or the state's expert made contact and said, We don't have this, then I could have responded to the Court. Because as I stand here today, this is the first I'm aware that they don't have this particular material in the records.

And it was made as a response to my trying to get the records together so they would have everything to review and prepare for closing arguments. I'm not disputing that they are entitled to it or that the Court signed an order or any of that. I'm just suggesting to the Court that only Dr. McClaren could certainly tell us whether he got it or didn't get it and it was nothing purposeful on our part. I don't understand the relevance to the objection, because the witness is not being called and, you know, what's the prejudice at this point?

So I believe that, you know, it's somewhat

premature. They are on knowledge [sic] with regard to what he's going to testify to in terms of the materials. And if they were going to challenge that, then certainly they would have planned to do that through their expert. So I can't understand what the problem is here. If, by some chance, Dr. Mosman's death occurred — and I don't know that to be the case — and the materials did not reach Dr. McClaren, you know, for some reason, Dr. Prichard may have a copy of these materials. I don't know the answer to that. I have not had an opportunity, your Honor, to ask Dr. Prichard if he has those materials that they are requesting at this time.

And I do apologize to the Court, because this is the first I've become aware of this problem. Certainly, Dr. Prichard could make these materials available to the state so they could provide them to their expert. I don't have any objection to that. But at this time, to come in and try to strike this testimony when they have been on notice, based on this report, what it entailed and what it contained, I -- you know, I find that just incredible, your Honor. And I would ask the Court not to allow the state to limit the defense in this

way from presenting this testimony.

MR. TATTI: First of all, your Honor, I'm not aware of any rule of procedure or any practice that says raw material doesn't come to me, it goes directly to my expert. The Court's order said it was to come to me. Every other piece of raw data came to me and then I gave it to my expert.

My expert is not in a position to make a hearsay objection, which is what I'm doing at the point the evidence is being or about to be offered, which is perfectly timely and perfectly appropriate.

The suggestion that there is no prejudice is ridiculous, because the — the report suggests an I.Q. score, which is what we're all here about. And it's an I.Q. score which I have no ability at all to challenge or question or test. It's never been testified to in a courtroom relating to Freddie Hall.

Now, there are I.Q. scores back from 1976. And all that has been the subject of testimony in the ongoing litigation that is the State of Florida versus Freddie Lee Hall. I'm not arguing about those. Those have come in. I didn't object to those in the past, as far as back as 1991. But

this one is completely new, has never been presented in court, and on the eve, or the few moments before it's about to be, I have a right to be heard on a legitimate objection to its admissibility.

I don't think I can more clearly state the fact: The man is dead. There is no way for me to challenge this. The base rules of evidence and frankly everything in the evidence code evolves out of the hearsay rule. This is the rankest form of hearsay, and it should not be permitted. And I would ask the Court to exclude it.

MS. RODRIGUEZ: The rules of hearsay, as this Court well knows, in post-conviction matters is relaxed. I'm not asking the Court to ignore the rules of evidence with regard to this proceeding. I'm suggesting to the Court that the expert rendered an opinion and proceeded in this case based on the data that was before him and the test scores that were submitted to him, which included Dr. Mosman. Had the defense left that out of the picture, the defense would not have been presenting a thorough case and all of the information that this expert relied upon in reaching a conclusion that Mr. Hall was mentally retarded. There is just

no way around it.

Dr. Mosman's test score definitely had an effect on Dr. Prichard. Dr. Prichard has had other cases where he has only done I.Q. testing and he has done nothing with regards to adaptive functioning. The reason that Dr. Prichard went forward, of course -- and, again, I can't speak for Dr. Prichard -- is because there was a 69 before him. So, obviously, it had a bearing on how he proceeded in this case, your Honor. He did go further. He did not just go with intelligence testing, but he did a full adaptive functioning evaluation on this client. So it had, definitely, a bearing in how Dr. Prichard approached this case. There is no way that Dr. Prichard can testify without talking about and his reliance on these test scores.

Now, the state can certainly impeach him and ask him questions about this and can see if he has the raw materials to provide to their expert. But the time to have had that done was through the discovery process and through depositions. I would suggest to the Court that this is not the appropriate time for this to having been coming up for the first time. This has been an issue,

apparently, if the state went over this report from Dr. Prichard, it should have been an issue when they received Dr. Prichard's report in 2003, not today. If something was missing from the materials that was critical to the state, the state never picked up the phone to call and ask for it. Or the expert never called and said they needed something further in order to fully evaluate and work on this case. So that's where we are, your Honor.

THE COURT: Anything else, Mr. Tatti?

MR. TATTI: No, sir.

THE COURT: Either side have any case law or any legal authority that they want to provide the Court?

MR. TATTI: Judge, I can pull cases that talk about the fact that, while the rules of evidence, particularly the hearsay rule, are somewhat relaxed in a sentencing proceeding, and in many regards in a post-conviction proceeding, the overriding rule is hearsay is admissible, provided the opposing party has a fair opportunity to rebut. And the cases are legend in which trial courts have excluded rank hearsay in which the opposite side has no opportunity -- no fair opportunity to rebut it. So I'm relying on a basic premise of evidence

here.

THE COURT: If Dr. Prichard has some material that you are looking for, would that in some way, through delay or whatever, cure the prejudice you are claiming?

MR. TATTI: It would certainly improve my situation. I cannot tell the Court it would resolve it. But I suspect that Dr. Prichard doesn't have that. Because, clearly, counsel was ordered in 2005 to give it to me if they had it, and I have never received it. And it is not in the packet that she has marked for identification as the material that was provided to Dr. Prichard.

MR. NUNNELLEY: Your Honor, may I be heard?

THE COURT: Sure.

MR. NUNNELLEY: I think perhaps one thing we need to do, first of all, Dr. Prichard is sitting right here. We can ask him.

THE COURT: I know that. I'm getting there.

MR. NUNNELLEY: Let's find out if he's got it, first of all.

THE COURT: That's where I was going.

MR. NUNNELLEY: If he has it, the problem we have is basically it's a Richardson violation, coupled up with a violation of a direct court order

if it hasn't been provided. But the point is we don't have any way -- the problem is, without the raw data, we can't inquire -- the simple -- just for example, we can't ask Dr. Prichard if Dr. Mosman scored the intelligence testing correctly. If he doesn't have the raw data and we don't have the raw data, we don't know. We have got to make the assumption that I think is a dangerous one, and an inappropriate one, that Dr. Mosman correctly scored it. We find score errors in the intelligence testing quite frequently. That's just an example of the problem that we're running into.

And I think what we need to know right now is whether or not Dr. Prichard has it. If he's got it, and they can give it to us and we'll deal with that down the road. If he doesn't have it —

THE COURT: All right.

MR. NUNNELLEY: -- then we have got a whole different set of problems. But the one thing I would cite the Court to would be one of the *Lightbourne* decisions. I apologize, I can't remember which one, I've done so many. But the rules of evidence are not suspended in this proceeding simply because it's post-conviction.

Simply because we're talking about sentencing, the rules of evidence, as they apply in the penalty phase, do not apply here. The rules are the rules. Those rules of evidence apply here, just like they do at any other trial.

THE COURT: All right. This is the way I think I'm going to handle it at this time. I'm going to note your objection and grant a continuing objection. We're going to call Dr. Prichard up. One of the very first questions, and we can do it either as a voir dire or whatever, is find out what he has in the way of the materials you are asking about. You know, ask some questions related to that and see where that gets us.

Then I will rule on that issue. I will tell the defense regardless of how I rule, I will allow you to proffer a proffer of the material.

MS. RODRIGUEZ: I understand, your Honor.

THE COURT: In case there is --

MS. RODRIGUEZ: I understand.

THE COURT: -- this ruling is an error in some way.

MS. RODRIGUEZ: I would suggest that we call Dr. Prichard up just for that purpose and allow the state --

THE COURT: He's going to come up anyway. Bring him up, put him under oath.

THE CLERK: Your Honor, I'm sorry, she never did hand me that packet for me to label it.

MS. RODRIGUEZ: I apologize.

THE CLERK: That's okay. You were busy.

MR. NUNNELLEY: Judge, for the record the *Lightbourne* citation 644 So.2d 54 from 1994.

THE COURT: That's the one that talks about the rules of evidence are not suspended?

MR. NUNNELLEY: Yes, sir, that's *Lightbourne*, before he was my case.

MS. RODRIGUEZ: Your Honor, I know that there are a series of cases with regard to expert-to-expert testimony. I would like to supplement the record with those cases as soon. As I can get back to my office, I would be more than happy to provide the Court with a list of the cases that allow an expert psychologist to testify regarding consultations with other expert psychologists and the extent of that testimony.

THE COURT: I think -- I know that's allowed, but only after the material that underlies that opinion has been discovered.

MS. RODRIGUEZ: Yes, your Honor.

THE COURT: All right. Okay. Dr. Prichard.

GREG PRICHARD, Ph.D.,

the witness herein, being first duly sworn, was examined and testified as follows:

THE WITNESS: I do.

MS. RODRIGUEZ: Your Honor, I will pass the witness to the state so they can voir dire him on this issue.

THE COURT: Fair enough. We need to establish his name at least and --

MR. TATTI: I'm very capable of doing that.

THE COURT: I know you are. I'm just saying that hasn't been done yet. We need to get that in the record.

VOIR DIRE EXAMINATION

BY MR. TATTI:

Q Would you state your name, please?

A Greg Prichard. Last name is P-R-I-C-H-A-R-D.

Q Dr. Prichard, were you consulted or approached by CCRC to evaluate an individual by the name of Freddie Lee Hall?

A Yes.

Q When were you first approached?

A It was in 2002. I don't remember the month.

Q All right. As a result of your retention by

CCRC, did you, in fact, evaluate Freddie Lee Hall?

A Yes, I did.

Q Prior to your evaluation, or subsequent to your actual meeting with Mr. Hall, did you receive materials from CCRC relating to Mr. Hall's background and history?

A Yes.

Q Among the materials you received, was there a report from a Dr. Bill Mosman?

A Yes.

Q Did you receive any additional material that appeared to relate to Dr. Mosman's report?

A No.

Q So you have never seen the actual testing instrument, any raw data or notes associated with Dr. Mosman's report; is that correct?

A That's correct.

MR. TATTI: I don't have any other questions.

THE COURT: Cross-Examination within the voir dire?

MS. RODRIGUEZ: Yes, your Honor.

VOIR DIRE EXAMINATION

BY MS. RODRIGUEZ:

Q Dr. Prichard, did you contact Mr. Mosman at any time after receiving that report?

A No.

Q Have any discussions with him at all?

A No.

MS. RODRIGUEZ: I have nothing further, your Honor.

THE COURT: All right. Counsel, anything further by way of argument?

MR. TATTI: No, sir.

THE COURT: All right. Then I'm going to sustain the objection of the state as to the testimony through conduit of Dr. Mosman for the reason that violation of — I'm not finding an intentional violation, but an inadvertent violation of the previous discovery order referenced February 1st of what year?

MR. TATTI: 2005.

THE COURT: 2005. The raw material that would relate to the testing by Dr. Mosman was not supplied. Therefore, the state is at great prejudice, unable to cross-examine, unable to challenge it through their own retained expert or otherwise. And therefore, it would be very unfair, grossly unfair, prejudicial to allow this in.

However, that being said, and that being the ruling of the Court, you may proffer it so that

there is some record of where you are coming from on this issue. And otherwise, you may proceed then with your Direct Examination of Dr. Prichard.

DIRECT EXAMINATION

BY MS. RODRIGUEZ:

Q Good morning, Dr. Prichard.

A Good morning.

Q Dr. Prichard, what is your occupation?

A I'm a licensed clinical psychologist in the state of Florida.

Q Can you state your credentials for me?

A I did my undergraduate work at University of Florida. I graduated there with honors in 1989.

MR. IATTI: Excuse me, Doctor. Your Honor, the state's prepared to stipulate that Dr. Prichard is more than qualified as an expert in the field of clinical psychology.

MS. RODRIGUEZ: We appreciate that, your Honor. If I could just go a few questions further to get the credentials on record?

THE COURT: Go ahead.

BY MR. DEFS:

Q Can you talk about any internships or residences that you have had?

A I graduated from my graduate school in 1994.

I did an internship at Florida State Hospital in Chattahoochee. I initially was a senior psychologist on a dual diagnosis unit, a unit for individuals who were developmentally delayed or mentally retarded and/or mentally ill. I worked at the hospital after my internship for about seven years, and I had one day of a week of private practice doing competency assessments, sanity assessments, other court-appointed work.

I began doing assessments for the Agency for Persons with Disabilities in the Tallahassee area in '96 to assess whether or not a person is mentally retarded or not. And I have been doing those evaluations continually since then. I've been in full-time private practice as a clinical and forensic psychologist since 2001. And 99 percent of what I do is forensic-related competency assessments, sanity assessments, sex offender risk assessments, mental retardation assessments.

Q You are a member of different professional organizations as well, which are those?

A American Psychological Association, Florida Psychological Association. American Association of Mental Retardation, now called American Association of Developmental Disabilities and Intellectual Limitations, or something like that.

Q Can you approximate for me how many mentally

retarded individuals you have evaluated?

A Yeah, I can approximate probably 1500, 2,000, maybe more, I'm not sure.

Q Approximately how many times have you administered Vineland as an adaptive test?

A At least 1,000 times.

Q And, obviously, you have been qualified many times as an expert in the mental retardation area in courts in Florida?

A Yes, ma'am.

Q I asked you to prepare a list of some of the cases you have been involved in, in terms of mental retardation cases.

A Yes, ma'am.

Q Were you able to do that?

A No. My office got the message after I had left town, so I didn't get the message until late yesterday.

Q You have been involved in a number of the mental retardation cases, specifically, in the state of Florida?

A Correct.

Q And in those cases have you appeared for both the defense and the state?

A Yes.

Q Were you the psychologist who testified in the case of *Cherry*?

A Yes. One of the psychologists that testified in that case.

Q In that capacity, were you employed by the state?

A I was initially hired by the state to assess Mr. Cherry, yes.

Q In that case, did you testify that he was not mentally retarded?

A In that case, I testified I believe that Mr. Cherry was mentally retarded.

Q And who retained you in this case?

A Your office did, Capital Collateral Regional Counsel, Middle Region.

Q Do you recall the attorney on the case at the time?

A Mr. Eric Pinkard.

Q And was it Mr. Pinkard that provided you with a package from our office with materials?

A Yes.

Q And in response to those materials that were presented to you, were you requested also to provide a CV to our office?

A Um.

Q Or at some time later?
A At some point, yes.
Q You were asked to provide a CV for our office?
A Yes.
MS. RODRIGUEZ: Your Honor, if the record might reflect I'm showing the witness both the CV and the exhibit with regards to the documents that were provided to him. (Tendering to the state first.)
(Defendant's Exhibit A identified for purposes of the record.)
BY MS. RODRIGUEZ:
Q I will show you first your CV and ask if that's a fair and accurate representation of your credentials.
A Yes.
Q And ask you next, as to what's been marked as Exhibit F for identification, is that a fair and accurate representation of the materials that were provided to you for review by Mr. Eric Pinkard?
A Looking at the index, if that's what is contained in this packet, yes.
MS. RODRIGUEZ: Your Honor, for the record, the CV is Defendant's Exhibit A.
THE COURT: Are you offering that?

MS. RODRIGUEZ: Your Honor, I was going to actually ask him the list from the index and then attempt to make the offer. I understand there is an objection as to the -- one of the items that's on the index and we can take up that issue.

THE COURT: I was asking about the CV.

MS. RODRIGUEZ: Yes, I was going to offer both, your Honor. Let me begin with the CV first, yes.

At this time I'd like to offer in Dr. Prichard's CV into the record. I believe the state may not have an objection since they offered to stipulate to his credentials early on, but . . .

MR. TATTI: No. There is a completely different basis. I object to the CV. It is hearsay. The doctor is perfectly willing, able, and I'm sure could more than accomplish what's on the CV by testifying. But the CV, itself, is hearsay, and I do object. I understand the Court's admitted it but --

THE COURT: Well, I am going to admit it. I think it's preliminary and I --

MS. RODRIGUEZ: I think the doctor's reviewed --

THE COURT: I need to do future search to see

what the law behind that is. But I have always allowed them, and it's preliminary and I don't quite understand the objection. Anyway, I'm going to overrule it, allow it into evidence.

What number will it receive?

THE CLERK: It will be Number 3.

THE COURT: Number 3.

(Defendant's Exhibit 3 received in evidence.)

BY MS. RODRIGUEZ:

Q Dr. Prichard, I'm going to hand you the exhibit list, the index to this exhibit.

A Yes, ma'am.

Q And I'm going to ask you if you could, please tell us what's listed on the index with regard to the specific items that were provided to you by CCRC.

A There was a report by Dr. Dorothy Otnow Lewis. Otnow is O-T-N-O-W. A report by Dr. Leslie Prichep, P-R-I-C-H-E-P; Barbara Bard, B-A-R-D; a report by Dr. Harry Krop; a report by Mrs. Marilyn Feldman; Dr. George Barnard, a report by him, a report by him; Dr. Jonathan Pincus, P-I-N-C-U-S; report by Dr. Carrera, C-A-R-R-E-R-A; a report by Dr. Kathleen Heide, H-E-I-D-E; report by Dr. Jethro Toomer, T-O-O-M-E-R; a report by Dr. Bill Mosman, M-O-S-M-A-N. Some Department of Corrections records from 1968/1969, when he was in

the Department of Corrections, and also from 1978 on. Transcripts of testimony by Dr. Barnard. Transcripts of testimony by Mr. Hall's sister Deana Mitchell-Rigsby; a transcript of testimony by another of Mr. Hall's sisters, Katie Mae Glenn, G-L-E-N-N. Transcript of testimony by one of his brothers, Mr. James Hall. Finding of fact for sentencing that was prepared by the Honorable Richard Tombrink, Jr., and some educational records.

Q Now, Doctor, obviously, you are familiar with the definition for mental retardation —

A Yes.

Q — that's in the rule?

A Yes, ma'am.

Q And could you share that definition with us?

A Mental retardation is basically a three-prong determination. The first prong is significantly subaverage intellectual functioning, which is defined as two standard deviations below the mean on an approved intellectual measure. Mean is 100 standard, deviation is 15, so below that is considered significantly subaverage or mentally retarded in terms of intellect.

Second prong is commensurate deficits in adaptive skills. Essentially, that means that a person's personal and social self-sufficiency, they are

unable to independently function in society because of their cognitive limitations. And that's measured by adaptive instruments, generally, the Vineland Adaptive Behavior Scales. So that's also represented by two standard deviations below the mean of 100. So the standard of deviation is 15, so below 70 is two standard deviations below the mean for adaptive deficits.

And the third prong is manifestation -- exhibit mental retardation is a developmental disability. So manifestation must be in the developmental years between years of age of birth and the age of 18.

Q Is the third prong, the developmental stage, is that discretionary?

A No.

Q Does that have to appear?

A It must appear because mental retardation is a developmental disability, as opposed to, for example, a head injury in adulthood. Even if a person has cognitive limitations after the head injury in adulthood, it's not a mentally retarded person because mental retardation is a developmental disability that occurs when the child is developing.

Q Have you ever evaluated a person and found a person with an I.Q. below 70 that's not mentally

retarded?

A Yes.

Q Discuss that with me, Doctor.

A Okay. The -- it is literally a three-prong process, when somebody has intellectual limitations that are significantly subaverage, meaning right at or around two standard deviations below the mean of 100 or right around 70 —

MR. TATTI: Judge, at this point, I'm going to interpose an objection. I have not interposed so far in this proceeding, but Dr. Prichard is reciting a clinician's approach to mental retardation, which I submit is not relevant to this proceeding. Because under the law, if an I.Q. is above 70, a person is not mentally retarded, regardless of the other two prongs of the test.

So to have him recite the conditions under which someone could be under 70 and not mentally retarded is of no consequence to this proceeding. It's irrelevant.

THE COURT: Well, first of all, I thought the doctor was using the three prongs from the rule. I think that's what he was discussing. I understand it's a theoretical situation or a hypothetical situation that he's discussing, perhaps. But I'm

going to overrule the objection at this time. Please make it again if you think it's . . .

MR. TATTI: Yes, sir.

THE COURT: -- germane.

THE WITNESS: So when you are assessing, when you get a numerical or a number as a person's I.Q. estimate after you administer an intellectual test, you know, there is always error in measurement. Any time you use a measuring device, there is error in measurement.

BY MS. RODRIGUEZ:

Q If you make a mistake, you are in error?

A There is always error; it's not a perfect process. So, for example, when you do a poll for a political poll, there is always a plus or minus three or four in doing a political poll. That's also representing that there is error in that measurement of, you know, polling people for political purposes.

Same goes for intellectual testing and other psychological testing. There is error inherent in that measurement. So when we obtain a score that's about two standard deviations below the mean, somewhere around 70, that's an estimated score. We have to take into account the error measurement, or the measurement error in that device. So an intellectual measure, the measurement

error is plus or minus four. So when you get an estimate, an I.Q. estimate, that's not a person's true I.Q. It's just an estimate. So we construct that error around that obtained score, plus or minus four, and then we can say with a certain level of confidence the person's true I.Q. falls in that range.

So when you have somebody who has an I.Q. of, say, 68, 69, 67, that person can still not be mentally retarded. It's important at that point that you have to assess adaptive behavior, because the whole relevant issue from the clinical perspective is, does the person's intellectual limitations impair his ability to function independently in society. So you have to assess adaptive skills. If their adaptive skills are adequate, even though they have an I.Q. of 67 or 68, they are not mentally retarded.

Q All right. So that I understand your testimony, an I.Q. score alone does not establish mental retardation?

A That's correct.

Q Now, I believe you also said that the third prong, prior to age 18, is not discretionary. It's required for a showing of some type of -- evidence of, if you will, mental retardation?

A Right, because it's a developmental disability

as opposed to some other kind of disability generated by a head injury or generated by substance abuse or Alzheimer's disease, where cognitive limitations can be present. But to distinguish those kinds of deficits from mental retardation, mental retardation is a developmental disability. You usually observe it in children after they are born in the developmental years, all the way up to the age of 18 when they are generally fully developed.

Q So hypothetically, if you have a score below 70 and you also have with it the deficits, but you have no evidence whatsoever of any mental retardation, anywhere in the record prior to age 18, are you able to make a diagnosis of mental retardation?

A I mean, it would be very difficult if just — there was no information available. If information is available prior to the age of 18 that suggests a person didn't have those deficits prior to the age of 18, then you could say with a reasonable degree of psychological certainty that the person is not mentally retarded, because in the developmental years there is evidence that he didn't have the deficits.

Q What are the things that you look for when you are looking for those deficits to establish the third prong?

A Well, I mean, it's deficiencies in adaptive behavior. In other words, when you compare the individual you are assessing to same-age peers, are there deficits in the person's ability to adapt to the point that, essentially, they need help in taking care of daily life demands.

Q What type of information do you gather in doing that?

A The best way to gather it is if you have relatives who were with the person when they were developing, prior to the age of 18. You want to know about his academic functioning, how well he communicated. Was he able to manage money? Did he have a lot of friends? You know, things that have to do with adaptive proficiency and whether a person can be considered as, you know, adapting normally, compared to same-age peers or subnormally.

Q In Mr. Hall's case, specifically, did you attempt to look for evidence with regards to the third prong?

A Yes.

Q And what evidence, if any, did you find in this record?

MR. TATTI: Again, I know your Honor has given me a continuing objection to this line, but she has

not, to this point, complied with the Court's order in limine directing that some evidence be presented at this point that Mr. Hall's I.Q. is 70 or below. And, therefore, all of this with regard to Mr. Hall specifically is irrelevant to this proceeding.

MS. RODRIGUEZ: Your Honor, my response to that is that this expert testified that the third prong is not discretionary on his part. So it's very relevant to this proceeding for this Court to hear evidence as to the third prong in the mental retardation diagnosis. It — the testimony that this witness has provided is that, while you can have an I.Q. under 70 and not be mentally retarded, you must have evidence in the record for him to have had mental retardation prior to age 18.

So contrary to the state's position that I.Q, in and of itself, can determine mental retardation, this witness has indicated that the onset must be looked at in all of these cases before you can make this particular diagnosis. And if you don't have the evidence as to onset, I suggest to the Court that that's the criteria for being able to make the — you know, the diagnosis, not I.Q. alone as the state's suggested to the Court in its motion in limine.

THE COURT: Counsel, you know as well as everyone in this courtroom that there are three prongs, and that you have to meet all three prongs, and the failure to meet any one of those three prongs means the defense fails. You also have to meet them by clear and convincing evidence.

MS. RODRIGUEZ: I understand that.

THE COURT: Based on the motion in limine that I have already granted yesterday, you need to first put into the record some evidence that Mr. Hall has an I.Q. under 70. To this point, I don't believe that there was anything to that effect. And, therefore, based on my ruling on the motion in limine yesterday, the state's objection is well taken.

BY MS. RODRIGUEZ:

Q Dr. Prichard, did you review the history of the test scores in Mr. Hall's case?

A Yes.

Q And in reviewing that history, was there any data to suggest that there were any scores below 70?

A Yes.

Q And if you would, please elaborate on that for the Court.

MR. TATTI: And if part of that is

Dr. Mosman's report, I object.

THE COURT: All right. And I presume that's what the witness will rely upon. So I'm going to sustain the objection. However, at this point, you may proffer the evidence into the record.

MS. RODRIGUEZ: You may answer.

THE COURT: You may answer the question.

THE WITNESS: Okay. All right. I would say that there are several scores that suggest Mr. Hall's I.Q. is potentially under 70. When I consider in my analysis the obvious measurement error, so including my own result of a full-scale score of 71, but I will take them one at a time. Dr. Mosman's evaluation conducted in 2001, he administered WAIS, Wechsler Adult Intelligence Scale-Third Edition. And his I.Q., full-scale I.Q., was a 69 for Mr. Hall.

THE COURT: What year was that?

THE WITNESS: That was 2001, sir.

THE COURT: Okay.

THE WITNESS: So that was a full-scale score below 70. Now, again, there was my evaluation where I had a full-scale score of 71. Essentially it's an identical score from Dr. Mosman's full-scale of 71 versus a full-scale of 69 is

statistically not even close to being different. So, essentially, they are identical scores.

Again, it's the obtained score of 71 versus the true I.Q. score, which is going to fall within a certain range when you consider the measurement error of plus or minus three or four. So, in my case, obtained score of 71, you are talking about a potential true I.Q. score of about 67, 68, up to about 76. So that would also apply -- the same kind of analysis would apply to Dr. Krop's evaluation of Mr. Hall in 1990, and Dr. Krop's full-scale score was a 73.

THE COURT: What was the date of your test, sir?

THE WITNESS: My test was August 15th of 2002.

BY MS. RODRIGUEZ:

Q How did you learn of Dr. Mosman's testing?

A I received a report that Dr. Mosman generated in 2001.

Q Was that report something you relied upon in making a decision in this case?

A Yes. I mean, the -- any background historical I.Q. testing, for me, is relevant to the analysis.

Q It was not the sole matter that you reviewed

upon [sic]?

A It's not the sole matter I relied upon, no.

Q Do you have a copy of your documents with you?

A I -- you actually took most of my documents last night. What are you looking for?

Q Those that you relied upon.

A No, I don't have all those. I have Dr. Mosman's report.

Q That's where I'm going. Do you have Dr. Mosman's report?

A Yes, I've got Dr. Mosman's report.

MR. NUNNELLEY: We are still on proffer, right, Judge?

THE COURT: That is still a proffer.

BY MS. RODRIGUEZ:

Q Having reviewed Dr. Mosman's report, what did you find, if anything, with regard to the contents of this report? Did you review the way the test was administered?

A Well, I couldn't really do that. I just had to review his reported scores and in -- it's a lengthy report. It talks about some of the same things that I attended to, which was Mr. Hall's problems in school, in education, some recognition that he had some trouble in the Department of Corrections when he was first there,

in the late 1960s.

Dr. Mosman commented on some prior testing that had been conducted with Mr. Hall and just reported his I.Q. result with the Wechsler Adult Intelligence Scale-Third Edition, verbal I.Q. of 73, performance I.Q. of 70, full-scale I.Q. score of 69.

He also administered what's called the Leiter Intelligence Scale that is an approved measure for -- I have not used that scale, but on the Leiter, he reports a score of, I believe it was, 53. And he also did testing with the Vineland Adaptive Behavior Scales, and the Adaptive Behavior Composite was a 51.

Q What type of adaptive behavior scale or measurement do you use, what instrument?

A He [sic] used the Vineland Adaptive Behavior Scale.

Q Would that have been the same instrument you would have used?

A Correct.

Q Turning back to the report itself, is it a lengthy report, Dr. Prichard?

A Yes, it is.

Q How many pages is this report?

A It is 17.

Q And it begins with a summary, if you will, of

his position with regards to Mr. Hall's mental status?

A Yes.

Q And what did Dr. Mosman find that to be or communicate to you in his report?

MR. TATTI: Judge, I understand we're still on this proffer, but this is exactly why I made the objection I made. She's going to elicit the words of Dr. Mosman from another witness without me having any ability at all to cross-examine, and it's patently unfair. And I want the record to be clear that I object to this entire line of questioning relating to Dr. Mosman's test scores or his report, regardless of how long it is.

MS. RODRIGUEZ: Your Honor, it's a proffer, I would submit to the Court. And in order to have a full proffer for the purposes of the review at the conclusion of this hearing, I'm required to put the information before the Court. And that is the purpose of my questions at this --

I'm sorry, your Honor, I can't --

MR. TATTI: He was talking to me.

MS. RODRIGUEZ: I know, but . . .

MR. NUNNELLEY: Are we no longer entitled to converse between counsel, Judge?

MS. RODRIGUEZ: Quietly.

MR. TATTI: I can't hear very well, so that's part of the problem.

Judge, I understand her obligation. But the appellate courts have made it very clear, I'm under an obligation to object.

THE COURT: Right.

MR. TATTI: And my failure to do so waives what would otherwise be a perfectly legitimate claim. So I'm going to object when I feel the need. And when she begins to ask the witness to read and quote from this report which I have objected to, I felt the need to register my objection again.

THE COURT: I note your objection. It's a continuing objection. I will note again for the record, this is strictly a proffer. This is not competent, substantial evidence at this point.

You may proceed.

BY MS. RODRIGUEZ:

Q In his summary, Dr. Mosman communicates to you with regard to the performance, if you will, of Mr. Hall and the performance in particular with regards to the — both the I.Q. and the adaptive behavior components with regards to the issue being the mental retardation issue.

A Correct.

Q If you could, summarize for me if you would --
A Basically --
Q -- what his position was.
A — right. Dr. Mosman said, based on his testing and analysis of records, that he believed Mr. Hall demonstrated significantly subaverage intellectual abilities, two standard deviations or more below the mean of 100 in terms of intelligence, deficits and adaptive skills as measured by the Vineland Adaptive Behavior Scales, and manifestation of these deficits prior to the age of 18.

So Dr. Mosman's position was that Mr. Hall should be considered mentally retarded.

Q On Page 7, if you will, Dr. Mosman talks about the specific tests that were used in this particular case, the instruments. I believe you mentioned them briefly previously. If you would, please share with the Court the particular instruments that were used or part of this evaluation.

A The Wechsler Adult Intelligence Scale-Third Edition, the Leiter Adult Intelligence Scale, and the Vineland Adaptive Behavior Scales. And, yeah, he did administer more here. Hang on just a minute, I can tell you that. He also administered the Slosson, which is another intelligence scale; the Wide Range Achievement

Test-Third Edition. He did Trail Making A and Trail Making B.

Q Can you just describe what those tests are briefly?

A Well, the Slosson is just kind of a down-and-dirty I.Q. measure. It's not an approved measure for determining actual I.Q. It's good for rapid administration, basically, if you want to get kind of a screening of somebody's intellect. Wide Range Achievement Test is kind of an abbreviated psychoeducational test, where you are going to get a basic look at somebody's ability in terms of reading, arithmetic and reading. Trail Making is just kind of a memory and task that you -- a processing speed task that a person is asked to perform. And they have to do it as quickly as possible and it's timed, and that are timed and their error rate is compared to a developmental sample.

Q What did all the results of all those tests show in this report, if you will?

A As I mentioned, the WAIS-III, Wechsler Intelligence Scale-Third Edition, was a full-scale of zero 69. The Leiter Adult Intelligence Scale was a full-scale of 052. The Slosson, he reported mental age and not I.Q. The mental age was that of a ten-year,

six-month-old child. Wide Range Achievement Test-Third Edition, he also, again, reported age equivalents, rather than actual scores. And the age equivalent was about seven and eight years old for the academic tasks measured on that instrument.

Trail Making, it took him a long time to perform the task and he had a -- a lot of errors. He was three standard deviations away from the mean of the developmental group, when you compare his speed and error rate. On the Vineland his composite score was a 51. So basically, Dr. Mosman was characterizing that on all the instruments he administered, Mr. Hall evidenced deficits that he felt were consistent with retardation.

Q Are all those instruments recognized instruments that are used in the course of your profession?

A Yeah. Some are better than others. The WAIS, the Wechsler Scales, is basically the state-of-the-art in terms of measuring intelligence. The Leiter is a lesser used, but it's well-founded in the profession; it's well-respected in the profession. Vineland is an instrument, adaptive instrument, that's probably the state-of-the-art in terms of measuring adaptive behavior.

Now the Slosson, the Trail Making A and B, the

WRAT, those are more screening devices. Those aren't really devices that most clinicians would use in terms of trying to make a decision about whether a person is mentally retarded or not.

Q If you are working with a dual-diagnosis individual that might have mental health issues as well, would those other tests be appropriate to bring into the picture?

A Not really. My thinking is you either do a screening version if you are not really -- like, for example, you do the Slosson if you are not really interested in knowing -- if the critical issue is not a person's intellect, you use the Slosson just to get an idea of his intellect.

Q Does it corroborate, then you go further maybe and do another test?

A Maybe. You know, in terms of how you communicate with a person if he's borderline intellectually, according to Slosson, then you pay attention to that. If the Slosson says he's mentally retarded, you might then administer Wechsler Scale to get a better look at that.

Q Did anything with regard to the testing cause you to have any concern with regards to how Dr. Mosman communicated to you any of these results?

A No. I mean, Dr. Mosman -- I didn't know him, but he sounded like a competent person in terms of just reading his report.

Q Now, on Page 11 of this report, he gave a diagnostic discussion and actually has Axis I, Axis II, another axis here, and diagnostic numbers that correspond. They correspond to the different diagnoses?

A Yes, ma'am.

Q And if you would share with the Court the diagnostic discussion?

A Okay. Basically, on Axis I, there is -- Axis I is a main clinical disorders. Axis II is where we put if a person has a developmental disability or a personality disorder. So that's basically the two important axes. On Axis I, Dr. Mosman said that he felt Mr. Hall had a reading disorder. Also felt Mr. Hall had a mathematics disorder. Also a disorder of written expression, diagnosed him with schizophrenia, undifferentiated type. Physical abuse as a child and neglect as a child. Those would be things that are not really diagnoses but something that a clinician should pay attention to if they are doing therapy with them or something.

On Axis II, he diagnosed him with mild mental retardation. Also indicated that some testing suggested

moderate mental retardation.

Q He did not diagnose him as moderately mentally retarded, however, did he?

A No, he said the more conservative diagnosis would be mild mental retardation.

Q And the final axis, is that just a summary of some sort?

A The final axis, that's, let's see, he left out a Roman numeral on that last axis.

Q That would be III normally?

A Probably, yes. Axis III would be any medical issue, so I think he's saying that it looks like organic brain damage. Although he left out the Roman numeral III on that axis.

Q Did he conclude that mental retardation was the primary mental disorder?

A Yes.

Q There are a number of references in the testing as to mental age of this particular defendant. Is this consistent with the information that you had or reviewed in your own testing? Not that that's significant to this issue. I'm offering it for the benefits of this proffer.

A Would you ask the question again?

Q Sure. There is a lot of reference in this

report to mental age issues?

A Right.

Q And the question is, is that consistent with what you saw in your testing and your reports?

A Yes, when you get somebody who is mildly mentally retarded, their capacity is going to be at a sixth grade level. That doesn't mean that all mentally retarded folks can function at a sixth grade level. It means their capacity for a mildly mentally retarded person is about sixth grade, so it's about age 12.

So it's really in communicating -- if a 20- or 30- or 40-year-old has limitations communicating in terms of mental age, it just gives a good idea that the person is functioning about like a ten-year-old or fourth grader, whatever. So yeah, when he's scoring about a -- my I.Q. was 71, you are talking about the lower 2 percentile. You know, so you are talking about less than sixth grade functioning.

Q There is some language with regards to a diagnosis of schizophrenia here, along with the mental retardation. And the question is, can both of these diagnoses exist together at the same time?

A Yes.

Q And there's some discussion with regards to Vineland testing and the differentiation between mental

retardation and psychosis and some language with regards to that. Now, could you elaborate on that for us?

A Well, I mean, when you -- when you have somebody who is demonstrating some deficits you want to try to determine whether or not those deficits are generated by a psychotic mental illness like schizophrenia versus perhaps an intellectual or cognitive issue like mental retardation, you know, it's an important differential diagnosis and important thing to try to sort out as a clinician. If you see the deficits, is it because of a psychosis or, conversely, is it because of a developmental disability.

Q And is the Vineland used for that?

A Yes.

Q Is that what it's saying basically?

A Right. It's a good way to try to discriminate between exclusively a psychotic illness that's creating some cognitive issues versus an actual developmental disability.

Q Dr. Mosman completed a formal Vineland behavior analysis --

A Correct.

Q -- according to this lengthy report. And recorded some information with regards to that particular testing. Doctor, if you could, just state

for the record what the results of that testing showed.

A Well, the testing on the Vineland is broken down into generally three areas. It's communication domain, daily-living domain, and socialization domain, pretty self-explanatory. Communication has to do with receptive, expressive written communication. Daily living has do with how well the person functions around the house, brushes his teeth, cleans his room, puts on his clothes. Socialization has to do with how well they socialize with other people in the community at large.

On the Vineland that Dr. Mosman administered, I don't know who he administered it with. There has to be a responder. There has to be somebody reporting on the skills of Mr. Hall.

Q This is the same test that you administered, as well?

A Correct. And Dr. Mosman reported a communication score of 40. And again, this is the same scale as the intellectual measures. A mean is 100, standard deviation is 15. So two standard deviations below the mean is 70. Anything below that is considered to be adaptive deficits representing mental retardation ordinarily. Communication score of 40, daily living score of 56, socialization score of 71, and the cumulative or combined adaptive behavior composite score

was a 51.

Q What was his conclusion with regards to the meaning of those particular scores?

A That he was demonstrating -- that Mr. Hall was demonstrating adaptive deficits in a number of areas that were three standard deviations below the mean and believed that it was because of his cognitive or intellectual limitations.

Q Where did he find his more severe difficulties to be occurring?

A In communication. It was his standard score in communication was a 40, so that's essentially expressive and receptive communication skills and written communication skills.

Q Which did he find worse?

A (No audible response.)

Q Did he find him to have severe difficulties in the written language, in the areas of communication, in his writing in particular?

A Yes.

Q Was that a focus that he pointed out?

A Yes.

Q And in community and domestic areas, he found him to have a problem in that area?

A Yes. Community and domestic, these are kind

of subdomains in the daily living area and he felt that he had moderate -- mild to moderate deficits in those areas.

Q And he reported socialization domain as well as having problems in those areas?

A Right, deficits in interpersonal relationships, coping skills, and time structuring.

Q And finally, I believe you testified that the composite score -- what was that again?

A 51.

Q That means what, Doctor?

A Well, it's -- you are considering standard -- mean of 100 and standard deviation of 15. So you are looking at the deficits consistent with mental retardation are two standard deviations below the mean. So a score of 51 is more than three deviations below mean, so, you know, Dr. Mosman is representing that this shows his adaptive deficits that are consistent with mild to moderate mental retardation.

Q Anything in the way that this was administered, upon reading it, that caused you to have any questions or concerns with regard to how the Vineland Adaptive scales were administered?

A I don't know how it was administered. You know, I didn't talk to Dr. Mosman. I have no idea how

it was administered. But I'm assuming that -- he sounds like a competent person is all that I know.

Q But nothing you saw in the written format was anything different than what you would do yourself if you were conducting this evaluation?

A Right.

Q Okay. Finally, the WAIS-III, is that a actual test?

A The WAIS-III is an intelligence test. It's the Wechsler Scale Intelligence test that's used most broadly in the profession. This was the Third Edition, Roman numeral III, so Wechsler Adult Intelligence Scale-Third Edition. That's what Dr. Mosman used when he met with Mr. Hall in 2001.

Q How was his processing speed?

A It was 69, which is the second percentile. Again, that's -- you know, it's slow. It's right there on the line. You know, 70, a little below, a little above, it's right there on the line. So it was consistent with his full-scale score.

Q Is it consistent with that of a mentally retarded person?

A Yes. I mean, yeah. I mean, obviously, it's all those scores, verbal performance, full-scale processing speed, it hovers right around that mark of

70. So that's the issue. Obviously, the person has intellectual limitations; they are subaverage because average is 100. And then the determination becomes, within that range close to 70, do those limitations affect his ability to adapt well? That's really the question.

So, yeah, it's consistent with mental retardation, borderline I.Q., somewhere right around there.

Q Is the statement accurate that out of 100 people in the same peer group, 98 would be able to do better?

A Right, he's functioning in the second percentile. So, yes. That's how we compare. We compare the same-aged peers and what they scored on this measure at the same age. That's how we can make the comparison and communicate that he's in the second percentile, meaning that 98 out of 100 people his own age are going to do better than Mr. Hall did.

Q I believe you testified earlier that there were a number of other tests that he conducted as well, one being the Leiter Adult Intelligence Scale?

A Right.

Q And this test is used for some special purposes?

A I've never used the Leiter, but, yes, it is, you know, if you can't for some reason do the Wechsler or the Stanford-Binet, then your third option would be the Leiter.

Q So it is a test that is used by professionals in your field?

A Yes.

Q What were the results on that test?

A Verbal I.Q. score of 55, performance I.Q. score 47, and full-scale I.Q. score of 52.

Q Were these scales higher or lower than Wechsler's?

A That was lower. The Wechsler scale was a full-scale of 69. The Leiter was a full-scale of 52.

Q I believe you spoke earlier that some of these tests are used as corroborative purposes?

A They can be, yes.

Q This Slosson test was also administered?

A Correct.

Q What is Slosson?

A Slosson I.Q. is kind of a quickly administered screening I.Q. measure, more than anything else. It's often administered in, like, the Department of Corrections and other places where you don't have a lot of time to spend with each individual.

Q He communicated Mr. Hall's results?

A Well, he communicated his age equivalent. There is an I.Q. that the Slosson gives you, but he instead communicated the age equivalent for Mr. Hall's score. And that was a ten — equivalent to a ten-year, six-month-old child.

Q He tested his ability to do math and arithmetic problems on the Wide Range Achievement Test-Revision 3?

A Correct.

Q And that test reveals what about an individual?

A It's basically a screening device in psychoeducational functioning, which means instead of doing a Woodcock-Johnson, for example, which is a very extensive psychoeducational battery, the Wide Range Achievement Test is kind of a screening version of academy functioning in the area of spelling, reading, and arithmetic.

Q What did he find with regards to the problems?

A He was functioning — again, he doesn't report standard scores, but he reported age equivalent. So basically, Dr. Mosman is saying that his scores represent scores consistent with about a seven- or eight-year-old child, which would have been about second

or third grade.

Q Is he able to add two numbers with two digits in each number?

A It says he cannot add two numbers with two digits in each number.

Q Trail Making A and B is another test?

A Right.

Q Did he administer both or just one of those?

A Looks like just Trail Making B.

Q What was the purpose of that?

A It's a good measure for brain damage, kind of like the Bender-Gestalt.

Q But it doesn't come to play at all here in terms of the mental retardation diagnosis?

A Some professionals try to say that it demonstrates some cognitive issues, but I don't know why you would use it if you could use something else.

Q Okay. There is information that follows in Dr. Mosman's report with regards to diagnostic and the diagnoses of mental retardation with regards to referral for services, I believe -- I'm trying to paraphrase this -- to the Department of Developmental Services. And as it relates to a -- you know, a diagnosis during the time he was in school, his school period. Is that an analysis that you would do with regards to the third

prong that we were speaking about earlier? Would you look back to see what referrals were made? I'm trying to get an idea of what the purpose --

A Potentially, I mean, you have to do it. You have to -- to answer the question about whether the person is mentally retarded, you have to -- a big focus is going to be pre-18 because that's where the deficits have to be first noticed and documented. So, you know, part of what you could do is certainly look for referrals prior to the age of 18 that demonstrate that he was recognized as somebody with intellectual issues.

Q So in addition to your evaluation at this point, you would have to do a retrospective evaluation of prior to age 18 to look and see what's out there?

A Right. You just have to do it if you are going to do a competent evaluation. You can -- for example, if I went and tested somebody today, and I administered the Wechsler Scale immediately and he scored a 102, I would have to go no further. The question would be answered.

But -- so it's kind of a progression of things. If he's going to score somewhere in the area of 70 on an I.Q., then I have to go back and look pre-18 and see what I can discover about school records and adaptive functioning at that time, any intellectual

testing that was conducted at that time, any referrals that may have suggested he may have had some intellectual limitations or other limitations, learning disabilities or whatever. So that is how you kind of proceed.

Q I believe that you did review the school records in Mr. Hall's case and those are listed in your report as part of your review?

A Yes, ma'am.

Q And you reviewed records of Dr. Carrera?

A Yes.

Q And with regards to Dr. Carrera, is there anything in that information that became relevant to you or in Dr. Mosman's report with regard to Dr. Carrera in your final evaluation?

MR. IATTI: I'm a little confused, Judge. Exactly whose --

THE COURT: Now we're tripling, trying to triple bootstrap something?

MS. RODRIGUEZ: Part of the record below, as the state said, one of the experts — it's probably part of the resentencing testimony that we've asked the Court to take note of. I'm simply asking Dr. Prichard if it had any bearing on his opinion. It's listed as one of his documents. I don't know

whether it did or didn't.

MR. TATTI: That's not the way the question was asked.

THE COURT: Yeah, I didn't understand it that way at all. You didn't ask this doctor if he relied upon a certain doctor's report. It sounded to me like you were asking this doctor if Dr. Mosman relied upon --

MS. RODRIGUEZ: I apologize, your Honor. I apologize. I will try to clarify.

MR. NUNNELLEY: Are we done with the proffer then?

THE COURT: No, I don't think so, as far as I'm concerned we're still in the middle of it, because it's --

MS. RODRIGUEZ: That is correct, your Honor.

THE COURT: -- rambling on.

MS. RODRIGUEZ: That is true, your Honor. I have to make a record of the testimony. It was not my intent to present in this way, but that's become the issue. So I must put a full proffer in front of the Court.

MR. TATTI: Judge, can I beg the Court's indulgence to take a very brief recess at this point? It's after 10:30.

THE COURT: About five minutes.

MR. TATTI: Yes, sir. That's all it would take.

THE COURT: I understand. We'll all take a five-minute recess. Doctor, this is somewhat unusual. You are still on the stand. Don't talk about your testimony with anyone during the break. All right?

THE WITNESS: Yes, your Honor.

THE COURT: We'll be in recess, five minutes.

MR. TATTI: Thank you, your Honor.

(A recess was taken.)

THE COURT: Counsel, you may proceed where you left off.

MS. RODRIGUEZ: Thank you, your Honor.

BY MS. RODRIGUEZ:

Q Dr. Prichard, I have reviewed the pages in Dr. Mosman's report through Page 17. And I'm specifically referring to pages 12 through 17, where he reviews other parts of the record, which appear to be part of the record that you may have reviewed, as well.

So my question to you is, in reviewing those pages in Dr. Mosman's report, to you, is there anything in that information in those pages that you relied upon in terms of your opinion in this case?

A Probably not. I mean, what was important to me is Dr. Mosman's own results, the results of his testing that he performed. Essentially, everything else he's talking about, I had access to also.

Q Yeah, that would be my position. The first portion of the report that we have gone over, that's information that you would normally rely upon in making an opinion in a case?

A Yes.

Q And you did so in this particular case?

A It's one of the things I paid attention to, yes.

Q Now, there were enclosures, apparently, entitled Mental Retardation Forensic Analysis?

A Correct.

Q Did you see receive those, as well?

A Yes.

Q And then there appears to be also a chart of some kind, which looks like a time line, would it be fair to describe it that way?

A Yes, ma'am, right.

Q Was the time line of any use to you in terms of your opinion in this case, relying upon it in any way?

A It just kind of shows the time line — some of

the same stuff that I was looking at in my records. So, you know, he organized it well in this time line. But there is nothing in the time line that I was unaware of based on my review of the other records.

Q You relied on it -- in order to render a diagnosis in this case, you did look at it?

A Yes, I did look at it.

Q And the mental retardation forensic analysis, looks like a three-page attachment?

A Right.

Q Appears to have just covered the diagnostic criteria and seems to be information with regards to the different types of mental retardation. If you would look those over for accuracy and let me know whether or not you did or did not rely on any portion of that.

A I did read this as part of my original assessment when I reviewed the package related to Mr. Hall. I also read it in preparation for this hearing. So I did look at this, that was prepared by Dr. Mosman. It looks accurate to me.

Q Is there anything else in communications between yourself and Dr. Mosman that you took into consideration in rendering an opinion in this report that I have not addressed in this proffer?

MR. TATTI: Just so the record is clear, the

witness has at least two different times said he never spoke with Dr. Mosman.

THE COURT: That was my understanding.

MS. RODRIGUEZ: I was not the attorney, your Honor, I don't know.

THE COURT: I think he said that at least once today, maybe twice. That he's never talked to Dr. Mosman.

MR. TATTI: Never met him.

THE COURT: Yeah, did not know him.

BY MS. RODRIGUEZ:

Q My question was related to this particular report, from any -- anything in this report -- I guess I should probably say, to refresh your recollection, in the event you had any type of communication with Dr. Mosman in this case, this would be your opportunity to put it on the record.

A If I had any kind of communication with Dr. Mosman, I don't believe I've ever spoken to the man. And the -- from his report, I don't think there is anything more than what I've said that I relied on.

Again, what was important to me was his own testing results, just like in every case of every expert, I'm basically interested in their testing results.

Q How were the results — let me take that back. It's not unusual for you to receive a report in this particular format?

A No, it's not unusual.

Q So in your profession, there is not a particular form you use or something that you must have in order to pass along a report from one psychologist to another?

A Well, in my ethics, my professional ethics, we do not send raw data to anybody. We send raw data to another licensed professional. So, for example, if somebody asked me for raw data on a particular case, say an attorney asks me, I wouldn't send the attorney that raw data. I would have that attorney designate another licensed professional, and I would send it to that licensed professional, and he could then give it to the other attorney. That's just an ethical obligation I have in my profession.

Q Is it not in the administrative code as well, or do you know?

A I'm not sure if it's in the administrative code.

Q Do other psychologists use the same practice, or are you the only person?

A No, I mean, they should. It's part of our

ethical obligation, and it's basically about test security. You don't just send raw data to people who haven't been trained in what that means and stuff.

Q So in the cases that you are involved in, you do not send that information to counsel?

A No.

MS. RODRIGUEZ: Your Honor, at this point I think that the proffer is concluded. I would point to the Court — point out to the Court 90.704, which is the disclosure of facts or data relied upon by an expert. When an expert — and cite for the Court Ehrhardt, Florida Evidence Code at page 747 says when an expert relies upon inadmissible evidence under 90.704 in the form of an opinion, the expert can ordinarily testify to the source of the facts or data relied upon in forming the opinion. For example, an emergency room doctor who treats a child should be able to testify that she relied on the --

THE COURT: Excuse me. What are you reading from?

MS. RODRIGUEZ: Ehrhardt.

THE COURT: So you are reading from a commentary by Mr. Ehrhardt, Professor Ehrhardt?

MS. RODRIGUEZ: Yes, your Honor, I'm sorry.

2009 Edition, West Florida Practice Series. And it's Section 90.704, which deals with the -- gives an example of radiologist concerning the patient's x-rays or hearsay statements in the emergency room, regardless of whether the statements are admissible under a hearsay exception. And it discusses *J. V. v. Department of Children and Family Services*, 967 So.2d 354, which is a Florida Third DCA case, 2007. And also *Linn v. Fossum*, being 946 So.2d 1032, 1036, Florida, 2006.

And I would submit to the Court that the testimony given in the form of the proffer should be admitted as evidence as, in the course of the profession, being psychologists, clinical psychologists, it is not unusual for them to rely upon the opinion of another expert in the form of the letter submitted by Dr. Mosman in forming his opinion, and that this witness should be allowed to do so, and that this is the cite. Regardless of the -- whether the statements are admissible or not under the hearsay exceptions, those would be the preliminary cases that I would bring to the Court's attention to grant the defense's request to allow this as evidence in this case.

THE COURT: That still doesn't get around the

fact that there was a Court order that you were supposed to provide all the underlying data that was being relied upon, and that was not provided. And I don't think this case goes to that issue.

MS. RODRIGUEZ: I would submit that exclusion of this testimony at this time is too severe a sanction. I would submit to the Court that, as ccunsel of record -- and I've been on this case for at least a couple of years -- I have made every effort to comply with the Court's order. I would submit to the Court that the witness testified that the raw material would have gone directly between experts, is his practice, in order to have the material travel. It would never have come to the attorney.

I would submit to the Court that the prior counsel may not have known the information did not reach the state because the state never put counsel on notice that they didn't have it. And I took a deposition myself of the expert for the state and at no time did that expert rely on -- communicate to me that he did not have this raw material and needed to get it from me or I would have provided that material to him.

So I would suggest to the Court that the

defense was not on notice that they didn't have the raw material, and excluding this evidence at this point in time would be prejudicial to our case. And I would suggest to the Court that it would be too severe a sanction for the Court to undertake.

THE COURT: State wish to put anything on the record regarding that issue?

MR. TATTI: No, your Honor. I believe I have clearly stated my position on this matter.

And, frankly, my understanding is that Dr. Mosman died in May of 2007. So why Dr. Prichard's report was attached to their motion versus Dr. Mosman's is frankly a mystery to me today. Because Dr. Mosman was alive at the time this pleading was filed. And yet counsel chose to attach Dr. Prichard's report and identify him as the expert on whom they rely.

Frankly, Judge, I would engage in gross speculation to try to figure out why it was they attached Dr. Prichard's report instead of Dr. Mosman's. And all of these suspicions lead me to a bad place in terms of the reliability of Dr. Mosman's report, if he was, in fact, alive. And according to the information I have, he died in early May of 2007. But Dr. Prichard was identified

as the expert upon whom the defendant was relying in advancing his claim under Florida law that he was mentally retarded such that he may not be executed and Dr. Prichard's report says his I.Q. is 71. And lo and behold, the Supreme Court now says 70 or below is mentally retarded and anything above it isn't.

But I cannot more clearly express the frustration in my inability to cross-examine Dr. Mosman that went on during this proffer. Repeatedly, Dr. Prichard said, I don't know why he did that; this is a score that goes with this, but he didn't put the score; there is, at least, a typographical error on the axis. There were several errors that Dr. Prichard was able to identify in the report and was unable to explain why Dr. Mosman did what he did on several instances in the report.

I would suggest the evidence is unreliable (a) because it's hearsay, (b) because I have no opportunity to rebut it, much less a fair opportunity to rebut it. And even Dr. Prichard does not have the raw data that was the foundation for the report that he reviewed.

So my position is the same: It is grossly

unfair, in this proceeding, with the issues before the Court, to allow this expert to be a conduit for information on the ultimate issue without any opportunity to address it.

THE COURT: The defense knew what their burden was and they knew what the law required. And if Dr. Mosman was the person that had the vital test that they needed, Dr. Mosman should have been -- at least his testimony should have been perpetuated in some way, or something, so that it could have been properly utilized. At the very least, if it was that important, the raw data should have been provided in some form to counsel for the state, at the very least, through their expert, and that was not done.

I do acknowledge that it's a harsh result, perhaps, certainly from the defense perspective. But as I understand the law, that's the law. And my job is to follow the law. And the Court's ruling on that issue remains the same.

BY MS. RODRIGUEZ:

Q Dr. Prichard, at some point, did you have an opportunity yourself to assess Mr. Hall?

A Yes, I did.

Q And when --

THE COURT: Just one -- in your mind, Counsel, are you now out of the proffer and back on --

MS. RODRIGUEZ: Sorry, yes.

THE COURT: — direct, back on direct?

MS. RODRIGUEZ: Yes, your Honor.

THE COURT: Thank you.

THE WITNESS: I assessed Mr. Hall August 14th and August 15th of 2002 at the Union Correctional Institution's Death Row.

BY MS. RODRIGUEZ:

Q And, if you would, please describe the steps you took to assess him.

A The records that have been mentioned, I reviewed those records, I took note of things that were relevant to my assessment. When I saw Mr. Hall, I got a history from him, I interviewed him. And then I did testing with him. I did an intellectual measure, the Wechsler Adult Intelligence Scale-Third Edition. I also administered the Wide Range Achievement Test with him. I also spoke to his sister Ms. Deana Rigsby and to her — or excuse me, to his brother Mr. James Hall. I spoke with them about his basic history, and I also spoke with them in order to do adaptive testing with them, utilizing the Vineland Adaptive Behavior Scales.

Q Doctor, if you would, I think before the

proffer, we talked about the items that you consulted, and those are listed on the front of your report, I believe, the various items that you reviewed and we went through that list.

A Yes, ma'am.

Q And included in that list, you also reviewed school records for Mr. Hall?

A Yes.

MS. RODRIGUEZ: Your Honor, just so the record is clear, I'm going to . . .

(Whereupon a discussion was had off the record at counsel for the state's table.)

MR. TATTI: You would handle it by marking Dr. Mosman's report and exhibit, separating it from this other material. That's how.

MS. RODRIGUEZ: Yes, yeah, yeah.

Your Honor, we're going to take the Mosman material out of this package and have this entered into evidence, and that would be without state's objection once that's removed, correct?

MR. TATTI: I understand that Dr. Mosman's report and the attachments you referred to are going to be marked and made part of the record attendant to the proffer, but you are going to take it out.

MS. RODRIGUEZ: Even though it's referenced in the front of his package as being something that he reviewed, the state is suggesting that we take it out of this package. I guess I should ask the Court how it wants it done.

THE COURT: What are you trying to do?

MS. RODRIGUEZ: I'm trying to admit the documents reviewed by Dr. Prichard that's listed as documents he reviewed in forming an opinion in this case. Of those documents he did review, Dr. Mosman's, which is listed in the index that we prepared, as Number 12. The question is, and the discussion with the state, is how to handle that. The state would like Number 12 pulled from this package.

THE COURT: Separated? Is that the state's position?

MR. TATTI: I wouldn't have an objection to the packet if Dr. Mosman's material is removed.

THE COURT: All right. Let's do them separately. Dr. Mosman's will be a proffered exhibit only, not admitted. The other will come in without objection?

MR. TATTI: Yes, sir.

MR. NUNNELLEY: Judge, if I could step out to

make a witness management phone call?

THE COURT: Certainly. Okay if we proceed in your absence?

MR. NUNNELLEY: Certainly.

BY MS. RODRIGUEZ:

Q Based upon your training and experience, Dr. Prichard, were you confident that Mr. Hall made every effort to perform the test to the best of his ability?

A Yes, he seemed to be. I didn't have any suspicion that he wasn't performing optimally. He seemed to be honest with me, comparing what he told me to his history that I had already reviewed, and seemed to be working as hard as he could.

Q I believe you testified earlier with regards to the actual test that you utilized?

A Yes.

Q If you could explain your findings with regards to Mr. Hall's I.Q. test?

A The I.Q. test that I administered with him?

Q Yes, sir.

A I administered Wechsler Adult Intelligence Scale-Third Edition. My results were a verbal I.Q. score of 74, a performance I.Q. of 73, and a full-scale I.Q. score of 71.

Q Now, having administered the I.Q. test, what is the -- let me ask you this, having administered the I.Q. test, what did you do next? Did you review the record?

A Well, I had already reviewed the record pretty much when I saw him. Then when I -- before I saw him, I had reviewed most of the record provided to me. I administered the intelligence testing with him. I then administered the Wide Range Achievement Test, the academic screening test with him. Um --

Q Now, in reviewing the records and in reviewing his prior testing with regards to his pre-18 scores, did you come across any intelligence tests that were out there that would have shown a score on a recognized I.Q. test?

A Not an I.Q. score. What I did come across, I saw school records and I reviewed the school records. The thing that struck me about school records, although I did not see any formal I.Q. testing in the school environment, it doesn't mean it wasn't done, but it wasn't available to me to review. In 1952, when he was about six or seven years old, there is a note in his school records that said his mental maturity is far below his chronological age.

'53, age seven and eight, I have found Freddie

to be very inattentive and extra slow in comprehension. In 1954, age eight and nine, he is slow in all of his work. 1955, age nine and ten they said he is mentally retarded. 1956, age ten and 11, Freddie is slow in all phases of his work. 1957, age 11 and 12, mentally retarded. 1958, age 12 and 13, described as mentally retarded. 1961, age 15 and 16, also described as mentally retarded.

So what was relevant to me is that throughout school, between '52 and '61, he was described in terms that certainly represent to me that he had some academic difficulties and appeared to the people who were trying to teach him to have cognitive limitations, because he was described as mentally retarded, several times.

Q And in your review of these materials, you also looked at transcripts of the resentencing proceedings?

A Yes.

Q And did you review testimony of Ms. Hannah Foster, who was the superintendent of schools for Sumter County?

A I'm sure I did. I didn't review it in preparation for this hearing.

Q Listed on your report, in the front of your report, you have a number of documents that you

reviewed?

A Correct.

Q If you could, take a look at that?

A Right.

Q And in the course of your reporting of the school record information --

A Right.

Q -- would it assist you if I could show you a copy of the report?

A Um.

(Whereupon, a discussion was held off the record at counsel for the state's table.)

THE WITNESS: Sure. I'm not sure what you are talking about at this point.

MS. RODRIGUEZ: (Tendering document.)

THE WITNESS: Yes, right. That is what I reviewed, yes.

(Defendant's Exhibit D identified for purposes of the record.)

MS. RODRIGUEZ: Let the record reflect that the witness has reviewed an exhibit previously marked as clerk's Exhibit D.

BY MS. RODRIGUEZ:

Q And are those the report cards that you were just referring to, the records?

A Yes.

MS. RODRIGUEZ: Your Honor, I would seek to admit these as an exhibit. They are part of the documents that were submitted with the initial report?

MR. TATTI: They have already been admitted. They are part of the original packet.

MS. RODRIGUEZ: I just duplicated them, your Honor, so it would be easier for us to take into consideration in the closings.

THE COURT: It's a school record separately that you now want in evidence?

MS. RODRIGUEZ: Yes, your Honor, that the witness reviewed with regards to the mental retardation, comments that were on the report.

THE COURT: State have any objection to that?

MR. TATTI: Other than that it's to some extent cumulative, no, sir.

THE COURT: All right. Overlooking that issue, the school records of the defendant will be in evidence as Defendant's Exhibit what?

THE CLERK: It will be 4.

THE COURT: Okay. Defense 4.

(Defendant's Exhibit 4 received in evidence.)

BY MS. RODRIGUEZ:

Q Were you able to corroborate any of the information I believe that you testified to?

A Well, what I did is I noted that in the Department of Corrections records, when he was in the Department of Corrections in '68, '69, I think up to '72 or '73, there is reference to his school functioning as being poor, that he was, basically, socially promoted in school. Academically, he was not very good, but apparently, he was a pretty good football player. So he was socially promoted.

I also noted in the Department of Corrections a parental questionnaire. When I assessed Mr. Hall, his mother was deceased, but in a parental questionnaire from 1968, his mother said the same thing, that he -- it was hard to learn in school, that he couldn't learn, that he had head trouble and that he made no progress. So it appeared to me that the school records were saying, obviously, that he had some limitations. Mom was saying it in 1968. Department of Corrections was saying it around that time, as well. And I spoke to his sister and his brother, Deana Rigsby and James Hall.

Q Now, in the DOC information that you mentioned before, did you review a presentence investigation report dated December 20th, 1968?

A Yes.

Q What information did you learn from that report?

A Part of what I learned from that is there was reference to Mr. Hall not having history of an emotional disturbance, but appeared to be functioning below normal level, as was socially promoted in school and classified 4F, for intelligence purposes.

That reference is in reference to, in 1965, Mr. Hall tried to get into the military. But he was tested and he was classified 4F, because his score on the examination that was given for the military screening was apparently very low.

Q Did you review a Florida Department of Corrections psychological screening report dated December 23rd, '68?

A Yes.

Q What did you learn from that?

A Again, in that Department of Corrections, when they were checking out Mr. Hall in that reception at Department of Corrections, they describe his intelligence as inferior. They noted a reading level of 2.6. He was 24 years old at the time. And there is other commentary that's, you know, characterizing Mr. Hall, consistent with the other records that I was

reviewing. Would you like me to read the commentary?

Q Yes, if you would.

A It says, This individual shows characteristics of cultural, social, economic effectual and intellectual deprivation. He seems to be very inadequate and seems to lack the ability to adequately cope with the more complex factors of his environment. He seems also to lack the capacity to reason through to logical conclusion -- conclusions, problems of day-to-day living, thus having a tendency to act out rather than to come to logical conclusions.

Generally speaking, this individual does not seem to show any gross psychopathology; however, he does show characteristics which indicate a very inadequate personality and an individual who is almost a stariodopy (phonetic) -- and that's [sic] -- which you would expect to come from a culturally inadequate environment.

Q Was there a DOC confidential evaluation dated September 13, '78, in your records that you reviewed also?

A September 13th, yes.

Q And what did you learn from that?

A Again, it's a characterization -- again, this is '78 now. This is his second prison admission. Subject's prison record appeared fair, showing little

signs of self-improvement. Subject's intelligence quot.ent would be considered borderline retardation in intellectual ability.

Q Now, there was a Kent administered, a Kent. I guess, what is that?

A Kent is an older I.Q. measure. I have never administered the Kent. It's, again, one that's kind of more of a screening device than an in-depth I.Q. measure. But a Kent was administered to Mr. Hall while he was in the Department of Corrections and the Kent I.Q. in 1979 was a 79.

Q Is that comparable to Wechsler or WAIS or any of those, in any way?

A I mean, it's not really a measure that should be used in determining mental retardation. Basically, it's just a screening device that people use to try to classify an individual into certain groups that would be appropriate based on an estimate of his intelligence.

Q Is there reference to a 68 I.Q. on a DOC document dated August 22nd, 1969, within those records?

A There is a vocational report dated August of 1969. And it says -- let me see if I can find it here. It says, I am doubtful we'll -- we will be able to be of a great deal of help to this man -- and then it says

I.Q. 68 — but we'll certainly try.

Q Now, you reviewed both the resentencing transcript and post-conviction evidentiary hearing information in this case —

A Yes.

Q — at some point?

A Right.

Q How does mental retardation normally manifest itself?

A How does it normally manifest itself?

Q Yes.

A It can manifest itself in a number of different ways, but prenatally or when somebody is born, if they are exposed to anything that can create damage to the brain, that's a common etiology. When somebody is born, for example, when they suffer oxygen deprivation for some reason, the umbilical cord is wrapped around the neck, that can cause brain damage that can subsequently lead to mental retardation.

You can also have cultural deprivation. During the developmental years, you are not exposed to things that would maximize their intellectual capacity and, you know, they are not exposed to things that will stimulate and help them to intellectually grow. So there are many factors that can play into it, but a lot

of times it occurs prenatally and at the time of birth.

Q Is it something you would see in an individual's behavior? Would you note it that way first?

A Ordinarily, yes, you would. You would notice, because individuals with cognitive limitations and it's a developmental disability, usually there is a delay in their development. For example, there is a standard period of time when young children begin to walk, begin to babble, begin to potty train. Those are developmental milestones. So when you have an intellectually disabled child, generally, those things are slow. They are not able to demonstrate talking behavior and walking behavior, when normal children are able to demonstrate it.

Q In reviewing the records, you reviewed the prior testing and the various evaluations that were done in this case. Did you review a report from Dr. Krop?

A Yes.

Q That was a psychological report dated January 8th of '91?

A Correct.

Q Did you also review the testimony that he provided in this case?

A Yes.

Q What did you learn from that review?

A Dr. Krop was also -- kind of did a full-scale analysis of Mr. Hall's functioning and assessed him as to the issue of mental retardation. He did the evaluation in 1990, when Mr. Hall was 44 years old. He did administer an intellectual testing utilizing the Wechsler Adult Intelligence Scale-Revised Edition and reported a verbal score of 70, a performance score of 79, and full-scale score of 73. So Dr. Krop, in his analysis, indicated that he felt Mr. Hall was functionally retarded, was not able to adapt very well, because of his cognitive limitations.

Q Did Dr. Krop do an informal address as to the adaptive, or was it just I.Q. testing?

I just want to leave it at that.

A I don't remember him doing a formal analysis of adaptive behavior. But he did speak to other members of Mr. Hall's family and characterized, like I did, what his family related, essentially that Mr. Hall has always had difficulty adapting, in a number of areas.

Q Now, after you reviewed all of the documentation in this case with regards to Mr. Hall's I.Q., as you testified, yourself, you administered an I.Q. test to Mr. Hall, correct?

A Right.

Q Now, once you concluded your testing -- and I believe you have already reported your scores, but if you would remind me again what your scores are?

A My scores --

Q Your scores as to the I.Q. testing.

A My scores on the I.Q. test were a verbal I.Q. score of 74, a performance I.Q. score of 73, and a full-scale score of 71 on the Wechsler Adult Intelligence Scale-Third Edition.

Q What is the next step you took, and why is that?

A The next step I took was to contact family members. I contacted his sister Deana Rigsby and I contacted his brother James Hall. The reason I did that is because to that point, I still was -- I felt I was unable to make a determination on the ultimate issue as to whether Mr. Hall was mentally retarded. My I.Q. at the time was a 71, right on the cusp between mental retardation and borderline I.Q. A lot of historical information saying that people have recognized that he has limitations since he's been in first grade and all of his growing-up years.

So I wanted to interview his family or some family members, primarily for the purpose of doing adaptive behavior testing. And I had to do it

retrospective, which meant I had to try to get his family to help characterize Mr. Hall's functioning before he was 18 years old. And I did that with his sister Ms. Rigsby.

Q You have had other cases where you have represented [sic] other death row defendants?

A I've evaluated them, yes.

Q You have evaluated other death row defendants?

A Right.

Q And there have been other cases where you have not done adaptive behavior, and just done an I.Q. test --

A That's correct.

Q -- is that correct?

A Yes.

Q In this particular case, what was the difference? Why did you choose to go forward in this case?

A Well, for example, in the example I gave earlier, this actually happened: I assessed somebody recently for this same kind of proceeding, and he had a full-scale of 102, and that was the end of it. If somebody scores that high on the intellectual measure, you have answered the question about mental retardation. In that case, the answer was the person is not mentally

retarded; his I.Q. score was much too high.

In the case with Mr. Hall, the difference is you get a 71, and you have historical information that seems to all -- most everything seems to be saying the same thing. And that is that this is a man who functions somewhere in that range, between 65 and 75, in terms of obtained I.Q. So what becomes a pivotal issue in a case like that, when you have got a person who's between 65 and 75, they are going to have marginal adaptive behavior. At the very best, it's going to be marginal just because they are cognitively very low.

Q Do you have an ethical obligation to go forward, or is it a requirement for you to go forward and evaluate the adaptive when this occurs?

A I would say it's a little bit of both. If you are going to do an appropriate assessment, you should go forward. But the issue has not been resolved in my mind, my professional -- professionally, I have not resolved the issue of whether the person is mentally retarded at that point. So I proceed to do adaptive behavior testing. This is the important issue: If you have somebody who has a 69 I.Q., and you have somebody with a 71 I.Q. -- you know, it's not like 70 is a magic number that says if you get a 71, you are smarter than that guy who is a 69 and you are not mentally retarded.

The issue is if you have significantly subaverage intellect, right around 70, do those deficits contribute to adaptive inefficiency? That's the issue. It's two-pronged. It's two prong legally; it's two prong clinically. You have to assess when a person has an I.Q. of between 65 and 75, do those deficits create -- do those cognitive limitations create deficits in the person's ability to adapt? That's how you will answer the question as to whether a person is mentally retarded with those individuals between 65 and 75.

So, it's necessary to do it, to answer the question. And it's -- I mean, you are not doing a thorough evaluation if you don't.

Q In your opinion, Dr. Prichard, were you required to take that second step in order to be able to provide an opinion in this case and make a diagnosis in this case?

A Yes.

MS. RODRIGUEZ: Your Honor, at this point, the remainder of the information that I would elicit from this witness has to do with the adaptive functioning behavior. It's the second prong that Dr. Prichard evaluated. I don't want to violate the Court's order. If the Court wishes to put the remainder of this testimony on as a proffer and

consider it separately, then I would suggest that to the Court. But the adaptive functioning is the basis for the opinion and the diagnosis here. And I'm -- it's necessary for me to put that on in order for this witness to be able to testify fully.

THE COURT: State want to add anything to the record on this matter?

MR. TATTI: Not in any large measure, your Honor. I've stated my position several times. And very clearly, my position is that once the witness testified that his I.Q. test of Mr. Hall revealed a full-scale I.Q. of 71, that the inquiry under Florida law is over. And that any adaptive functioning, whether it relates to prong two or prong three, is irrelevant at that point.

But for purposes of her record and proffering the matter, then she can -- I don't have a problem with her continuing at this point.

THE COURT: In light of the ruling on the motion in limine and the previous rulings by the Court, I think that's the only way that I can consistently proceed. So I'm going to treat this as a proffer. I'm going to determine that through this witness, at least, you have not met the first prong, so that you are going to -- this is all a

proffer as to the second and possibly the third prong. It should be noted for the record as a proffer.

MR. TATTI: And this is as to the second prong?

THE COURT: Second or -- I don't know. Maybe he's going to talk about the third.

MS. RODRIGUEZ: Your Honor, we've presented evidence as to the third prong already.

THE COURT: I'm not trying to get you to be redundant or cumulative.

MR. TATTI: I just need to know what to object to.

THE COURT: It's proper at this point, because you don't get to any of -- any how . . .

Based on the motion in limine, you could not get to the second or third prong properly until you have met the first prong.

MS. RODRIGUEZ: Your Honor, the -- I understand the Court's ruling. There is an overlap between the second and the third prong. And the witness's testimony is such that the first thing he did was look at the third prong. So I want to make clear on the record that I'm trying to follow the Court's motion in limine.

THE COURT: I appreciate that. This is a proffer. You may proceed with the proffer.

MS. RODRIGUEZ: Thank you, your Honor.

BY MS. RODRIGUEZ:

Q Dr. Prichard, you went further, I believe it was your testimony, to formally do an assessment of Mr. Hall?

A Correct.

Q Can you tell me what test you used to go forward with that assessment?

A I had to do adaptive behavior testing to assess his adaptive skills. And I had to do it retrospectively, which meant I had to identify with somebody who knew him well prior to the age of 18, a time frame where they could respond as a respondent to my questions about his skill level at that time. And I chose his sister Deana Rigsby because she seemed to know him the best, spent a lot of time with him. She was eight years older than him.

And we identified a period of time prior to the age of 18 when they were -- it was the last year in 1960 that they lived in their mother's house. So she was able to kind of separate that from the rest of the history, because it stood out in her mind.

Q Now, just to make the record clear, is the

Vineland Adaptive Behavior Test one that's authorized by the Department of Children and Family Services in accordance with the rule for mental retardation, as far as the 3.203?

(Whereupon, Mr. Tatti stepped out.)

A Yes.

Q And that's the test that you undertook?

A Yes.

Q That test requires you to speak to an informant that knows the defendant?

A Right.

Q And basically, you asked a series of questions to the informant?

A Yes, I interview the informant and ask them about adaptive behavior in a number of different areas, communication, daily living, socialization. Primarily, it's kind of a semi-structured interview. And you make sure that you ask enough questions to be able to score the instrument. And that's what I did with Ms. Rigsby.

Q You did find a reliable respondent?

A I thought she was reliable, yes.

Q And you questioned her with questions from the Vineland and I believe you indicated in your report you used a reference age of 15?

A I actually used the reference age of 14 to 14,

3, which is pre-18. She was able to identify a time in 1960, when Mr. Hall would have been 15. I dropped back and used the age of 14 to 14, 3 in the Vineland to be a little more conservative in terms of trying to assess his adaptive skills. In other words, we were comparing him when he was about 15, we were comparing him with probably 14-year-olds.

Q So basically, the two-prong evaluation at the same time as you were going back to pre-18, as well?

A Right.

Q Now, what were the results of the information you got from this informant?

A Well, according to the characterization by Ms. Rigsby, he got a communication score of 39.

(Whereupon Mr. Tatti returned.)

Which is the same mean of 100, standard deviation of 15, daily living score of 48, socialization score of 52 and a composite score of 43. Which doctor — the one we referenced with Dr. Mosman was a composite score of 51, which was three standard deviations below the mean, and this would have been four standard deviations below the mean.

Q What does an adaptive skill function score mean between 33 and 53? What's that?

A What does it mean between 33 and 53? It means

that the person has significant adaptive deficits, as characterized by the respondent.

Q And has his score -- his composite deficits score was 43?

A Yes, ma'am.

Q And with what level of confidence can you state that opinion?

A Just like with an I.Q. measure, you have a composite score of 43, that's an estimate. So you construct the confidence interval around that obtained score, and the confidence interval is 33 to 53. So, with 95 percent confidence, you can state that the person's true adaptive composite is somewhere between 33 and 53. That range, obviously, is in the mentally deficient range. It's demonstrating adaptive deficits in virtually every domain measured.

Q Did you speak to another informant --

A I did --

Q -- or was this the only person you spoke with?

A I spoke also with a brother James Hall.

Q And what was the results you obtained following your questioning of Mr. Hall?

A According to the characterization by James Hall, he had -- communication score was 25, daily living was 60, socialization was 43, with an adaptive behavior

of 39. That estimate with the 95 percent confidence interval between 31 and 47 -- in generally the same range as his sister indicated.

Q You found the two -- the data consistent between the two informants?

A The data was consistent between the two informants. The characterization was also consistent with respect to affidavits, transcribed testimony from both James Hall and Deana Rigsby in 1988. So it was consistent with the information they provided at that time, too.

Q And the process that you used for measuring the adaptive behavior is consistent with what is used in your profession?

A Yes.

Q Okay. And as a result of both of these interviews that you conducted, did you reach an opinion with regard to Mr. Halls' adaptive behavior and function, if you will?

A Again, I felt that that formal assessment of it with his family obviously demonstrated consistent adaptive deficits across all domains measured. I felt that their characterization of his history was consistent with most everything I reviewed in the records in terms of recognizing that he had — he had

difficulties with his adaptation since grade school.

Q Having assessed his I.Q. and having then looked at the objective testing for adaptive behavior, did you -- you also looked at a number of documents that were in the file because they were -- due to extensive testing and different proceedings, correct?

A Right.

Q And was one of those an assessment from Dr. Barbara Bard?

A Yes.

Q That was September 8, '86, which is referred to in your report?

A Yes.

Q What did you learn, if anything, from that?

A Um.

Q That would bear upon the adaptive functioning question?

A If you are looking at that in my report, would you point me to the page, please?

Q Certainly. I'm looking at the list of witnesses that you have listed.

A I've got it. Page 9. Okay. Dr. Bard, this was in 1986. Mr. Hall was 41. She really talks about -- she did psychoeducational testing with him. And the psychoeducational testing was the

Woodcock-Johnson. That's a more extensive psychoeducational evaluation. And said that he was between 0 and 4.7 on every task except one, where his grade level was something like a six or seven. But characterized Mr. Hall as basically an illiterate adult. Didn't have many mathematical abilities. She said he's probably incapable of even the most basic living skills which incorporate math and reading, such as writing a check, keeping a checking account. She also commented on his speech as being incomprehensible and difficult to follow. His communication skills were not very good.

Q Are those the type of behaviors that you look for when assessing adaptive behavior deficits?

A Right. And I'm not going to score that. It should be understood that that's not information that I'm going to use to score an adaptive instrument. But it is consistent with the way he was characterized by his family. So it is a separate piece of information that's consistent with the characterization by his family.

Q Moving on to an evaluation that you reviewed from Dr. Dorothy Otnow Lewis dated September 10th of 1986.

A Right.

Q There was some information there relative to

adaptive behavior that was beneficial to you?

(Whereupon, Ms. Ahmed stepped out.)

A She called him -- she felt he was brain damaged. She called him a chronically psychotic brain-damaged individual with severe learning disabilities, difficulty with speech, receptive language was poor. So, again, consistent with what was noted by other professionals, what was characterized by his family.

Q And you found similar information to support your adaptive functioning diagnosis as to deficits from Dr. Jonathan Pincus, a report dated August 22nd, '88, or -- sorry, the neurological examination.

A Right, by Dr. Pincus in '88, when Mr. Hall was 43 -- indicated that Mr. Hall showed evidence of poor memory and probable mental retardation, and that he suspected Mr. Hall was mildly retarded and brain damaged.

Q And there was a report, psychological evaluation, dated August 22nd, '88, from a Dr. Jethro Toomer that talked about some speech impediments. My question is would those types of evaluations or comments from his report bear as to the adaptive deficits?

A Well, yes, in that it's consistent. And that's really what I'm looking for when I'm evaluating

all these past assessment results, is there consistency in the way that Mr. Hall is characterized by other people who have evaluated or talked to him, or whatever. And this is representative of a consistency with respect to how his family was characterizing him, how the school characterized him, how the prison characterized him. So yes, there is a lot of consistency in the reporting.

Q And speaking about that consistency, there were a number of observations, if you will, made by Dr. Toomer --

(Whereupon, Ms. Ahmed returned.)

-- as to the issue of Mr. Hall's mental retardation. And basically, did Mr. Dr. Toomer, in his report, find that he was achieving poor in school?

MR. TATTI: Judge, it has been for some time, but this is extremely leading at this point. She's reading from another report and then -- or from Dr. Prichard's report, and then asking him to confirm -- she's testifying.

MS. RODRIGUEZ: I can rephrase, your Honor.

THE COURT: Please rephrase.

BY MS. RODRIGUEZ:

Q Dr. Toomer in his report comments as to Mr. Hall's performance. Was that significant to you in terms of the adaptive function?

A It was essentially confirmatory in the sense that everything was saying that he functioned poorly in school. I didn't see any place that said Mr. Hall did pretty well in school. Everything was saying poor functioning in school.

Q Did that report indicate whether or not he had assessed him for both intellectual and personality functioning?

A Dr. Toomer's?

Q Yes.

A He commented about — I don't -- Dr. Toomer said that verbal reasoning, Wechsler Adult Intelligence Scale was largely concretistic (phonetic) and inadequate. But doesn't report any scores that I saw.

But, I mean, Dr. Toomer's ultimate opinion was that he has -- Mr. Hall has mental and emotional disturbance, severe impairment in cognitive functioning, and organic brain damage.

Q Did the report indicate these conditions to be of recent nature?

A No. It was long-standing, lifelong.

Q Was there anything in Dr. Toomer's evaluation or any other expert that would speak as to Mr. Hall's ability to — his mental functioning in terms of being easily influenced?

A Well, I mean, that's one way that Dr. Toomer also described Mr. Hall as being easily influenced. It's consistent with the way his family characterized him.

Q Is that something consistent with low deficits in adaptive behavior, being easily influenced?

A Yes. I mean, mentally retarded individuals, even individuals that are borderline I.Q., you know, they are not average, they are more gullible, more easily led, more easily taken advantage of and, because of that, more vulnerable. That characterization, you don't usually make that characterization for people who are above average or average intellectually. It's usually a characterization that's consistent for the folks who are mentally retarded or borderline, right on the cusp. Definitely for the people who are mildly to moderately mentally retarded.

MS. RODRIGUEZ: Your Honor, I need to go back on the record. This is the end of the proffer with regard to the adaptive behavior. And I need to go back on the record for the purpose of confirming with the witness that he wrote a report in this case and that he give an opinion in this case and what that opinion was based on, and that would be the end of the testimony, your Honor.

MR. TATTI: Well, my understanding was that proffer was to the second prong of the retardation.

THE COURT: Second and third possibly.

MR. TATTI: Well, my position is that absolutely no testimony was adduced as to Mr. Hall's contemporaneous level of adaptive functioning contemporaneous with the actual psychological testing which established his I.Q. score. That is what the law requires. The 18 and before is the third prong. But both the DSM and Florida law require a significantly subaverage general intelligence level existing with deficits in adaptive functioning. And there has been not one word in this proffer about the level of Mr. Hall's adaptive functioning at the time that Dr. Prichard administered his test on August the 15th of 2002. Not one word.

Everything has related back to the time when Mr. Hall was a teenager and a young adult, around the time of his first incarceration, which was in the late '60s. So, while we're on the proffer, I would submit that no evidence has been adduced to establish the second prong of the relevant test in the rule or the Statute 921.137.

THE COURT: Are you waiting -- I didn't know

if you wanted to respond or not.

MS. RODRIGUEZ: Your Honor, I'm trying to comply with the motion in limine, and it's a very difficult situation here that I've been placed in. I could easily -- you know, have put on evidence through this witness. But I'm in a proffer situation/I'm not in a proffer situation. So, you know, that's my dilemma, your Honor. I apologize, but that's exactly where I'm at.

THE COURT: Well, in light of the motion in limine, I think you just need to remain under the proffer and finish your testimony through this witness. The testimony — there is -- through this witness, there is no testimony as to an I.Q. 70 or under, which makes everything that follows part of the motion in limine suspect.

MS. RODRIGUEZ: Yes, your Honor.

THE COURT: The second prong is challenged in the second part of the state's motion in limine, where they discuss both the case law and the rule require general -- subaverage general intellectual functioning existing concurrently with deficits -- with deficits in adaptive behavior. And there hasn't been any -- I agree, I did not hear it. If there was, I missed it. I didn't hear any from

this witness on that point.

So I think where you are is there is some legal inadequacies with the testimony of this witness and you best — if you want to go forward with this kind of testimony, you are stuck doing the proffer.

MS. RODRIGUEZ: Your Honor, this Court determined that a retrospective evaluation is prohibited by law.

THE COURT: No, no. I'm saying the third prong, that's probably about the only way you are going to do it, if the person is already over 18 is to do it historically. But it's the second prong -- there is a case, I think it's *Phillips*, that says we've — I'm reading Page 511 of *Phillips v. State*, which is found at 984 So.2d 503: We found that both the statute and the rule require significantly subaverage general intellectual functioning to exist concurrently. And they highlight "concurrently."

MS. RODRIGUEZ: Your Honor, I believe *Phillips* —

THE COURT: Just a second -- with deficits in adaptive behavior.

MS. RODRIGUEZ: Your Honor, I believe the

reading of *Phillips* is not to do away with retrospective applications.

THE COURT: Not as to the third prong.

MS. RODRIGUEZ: *Phillips* doesn't say that, your Honor, that it's limited to the third prong. I'm suggesting to the Court that you can do -- you have to have both. You have to have the retrospective and you do have to have evidence of current, but this Court's ruling in terms of the motion in limine was as to adaptive evidence -- evidence as to adaptive behavior. So that's why I felt constrained with regards to this witness's testimony.

This particular witness -- it's my position that this witness is able to assess Mr. Hall using a retrospective application. And he can do it today. What happened in *Phillips* is they wanted to do only one and suggest that the retrospective application was it.

Dr. Prichard has done both. He's seen the man now. He's looked at the man now. He's talked to the relatives now. He's done an assessment of his relatives now. So he would be getting information from the past and how he was because he has to establish the third prong. But we're attempting to

use this as a current evaluation. There is no requirement that he have two.

And I guess that's the dilemma, because it's the same evaluation. There is not a separate evaluation, your Honor, that we've done. There has only been one, that's the Vineland, done by this expert. And it's his testimony that Mr. Hall is mentally retarded. I'm suggesting to the Court there is no Supreme Court ruling that says he cannot undertake this evaluation and offer this testimony. I'm suggesting to the Court that *Phillips* says you can't rely solely on one factor. He's tested him now. His test result is now.

Now, the Court can look at the weight of the evidence, and the Court can certainly come to a different conclusion in terms of what we've offered for evidence. But I'm suggesting to the Court that we're permitted to put that evidence on and then the Court can make a determination.

THE COURT: State?

MR. TATTI: Judge, perhaps the point I was attempting to make got lost in there somewhere. If we assume the Court made no pretrial ruling. The law requires that the defendant by clear and convincing evidence to establish three things, and

they are joined by the word "and." The first of those is that his I.Q. is 70 or below. I submit the testimony thus far from this witness, based on his evaluation, fails to meet that first prong. After the "and" comes contemporaneous deficits in adaptive functioning.

THE COURT: Concurrent.

MR. TATTI: Concurrent. The relevant community to assess, I submit, would be the Department of Corrections, because, factually, this defendant has been incarcerated in the Department of Corrections since February of 1978. There has been no testimony, for instance, that Dr. Prichard interviewed corrections officers or classification officers or reviewed records of how Mr. Hall functions in his present community. He's testified that he interviewed the family members for the purpose of establishing the level of his functioning at age 18. He jumped right to the third prong. But there has been no evidence at all as to the second prong.

And I submit, notwithstanding the motion in limine of the three prongs, the only evidence adduced by this witness goes to the last prong. He fails on the third prong, the I.Q. level. There

has been no testimony at all about his adaptive functioning at the time of the test, which is what is relevant under the Florida law. And I submit that's what's relevant under the DSM. So regardless of what hat we're wearing, I think we have an issue with even a diagnosis of mental retardation, much less a legal finding of it.

THE COURT: I'm certainly not going to go anywhere near the DSM. That's way beyond my field, and I won't even attempt to tell you what that means or says or requires. But legally, I think we all know what the rule and the statute call for. Three prongs all have to be met, all have to be met by clear and convincing evidence. The burden is on the defense. You don't meet any one of them, you fail. All three have to be met.

Now, through this witness, as testified, based on my recollection, we don't — through this witness alone, we don't meet prong one. We have not met prong two yet. Prong three, arguably, there is evidence.

So, I don't know what you are asking me. I don't know where you are trying to go. But I think based on the motion in limine filed yesterday, you know, you fail on the first two prongs. So, if you

want more information from this witness, you should do it as a proffer, because you can't meet the prongs and, therefore, technically, it should -- should be ended at that point.

But I'm going to allow you to proffer it. So if you want to proffer, proffer away. But I think it needs to be under the proffer unless you have something that we have not heard that would change the Court's ruling.

MS. RODRIGUEZ: Well, your Honor, now I'm totally confused. Because when the -- when this witness took this case to evaluate this defendant, he did so as a clinician, not a lawyer and not with *Cherry*.

THE COURT: I understand that.

MS. RODRIGUEZ: But that's a dilemma, your Honor. Because today, Cherry is being applied to his evaluation. And he was consulted and wrote a report in 2003. So I guess my dilemma is that he conducted an evaluation, and that evaluation was based on a retrospective evaluation of his adaptive skills. And the DSM allows him to do this. This is the problem that I'm having, your Honor. If the Court wishes me, I will put it in as a proffer and continue and asking him the questions.

THE COURT: That's what you need to do. Again, I'm not telling you -- all I'm telling you is my understanding of the law. And I think the law is pretty straightforward, and I think we all understand what the law is. It's your job to meet the requirements of the law. If you cannot do it through this witness, then, you know, that's an issue -- we'll figure out what it means some other day.

But for right now, based on the objection of the state, based on the motion in limine raised yesterday, unless ever you have something new that we have not heard that would change my mind, you need to finish up your proffer and get whatever you want from this witness in the form of the proffer --

MS. RODRIGUEZ: I will.

THE COURT: -- within the confines of the proffer.

MS. RODRIGUEZ: Well, your Honor, I wanted to get the opinion of the witness on the record is my dilemma.

THE COURT: You can do that as a proffer.

MS. RODRIGUEZ: I suppose I can, but there is a difference between the evidence in a proffer and

the evidence in the record. So that's why I was wanting just the opinion, your Honor.

THE COURT: Well, based on the evidence presented to this point, through this witness only, we're only talking about this witness, you can't meet prong one, and you have not met prong two. So prong three, you have provided some evidence on. That's where I see it, at this point, through this witness alone.

So again, this is at least the third time I've said it. I will say it one more time: Based on the proffer, based on the state's — excuse me, based on the motion in limine, based on the state's objection, the way to finish with this witness if you want to get more testimony from this witness along the lines that I think you want, you need to do it within the confines of a proffer.

MS. RODRIGUEZ: I will, your Honor.

THE COURT: Thank you. We're continuing in the proffer.

BY MS. RODRIGUEZ:

Q Dr. Prichard, you were retained by CCRC to do an evaluation of Mr. Hall?

A Yes, ma'am.

Q That evaluation was for the purposes of mental

retardation?

A Yes, ma'am.

Q And in order to do that evaluation for the purposes of doing it for mental retardation, you are required to get an intelligence test?

A Correct.

Q And you administered an intelligence test to the defendant, Mr. Hall?

A Yes.

Q And, I believe, you have already testified with regards to the results of those tests, but if you would once more tell the Court, please, the results of those tests, just the scores, please?

A Verbal I.Q. 74, performance I.Q. 73, and full-scale I.Q. score of 71.

Q Based upon your experience, which is detailed in the record, you felt it was necessary for you to go forward with the evaluation of his adaptive behavior?

A Yes.

Q And having done an assessment of his adaptive behavior, was that assessment done using instruments that are recognized by your profession as well as Florida law?

A Yes.

Q And the result of those evaluations were that

there were deficits?

A Yes, deficits in adaptive skills consistent with measured I.Q., basically consistent with mental retardation.

Q And having said that, you evaluated both the intelligence and the adaptive and went further to look for evidence in this record with regards to the third prong of the mental retardation criteria, being prior to age 18?

A Yes, ma'am.

Q Not necessarily in that order, correct?

A Correct.

Q And having done that, you reached a conclusion in this case with regards to the facts as you see them and the diagnosis in this case?

A Yes.

Q And could you state with a medical degree of certainty or psychological degree of certainty what that opinion is?

A Right. All the records that I reviewed, and I reviewed a bunch of records, and the testing that I performed, the test scorings that I reviewed, I felt like the evidence for my purposes in performing clinical evaluation, was that Mr. Hall did meet the three prongs required for a diagnosis of mild mental retardation.

Q Based on your experience and knowledge in working with mental retardation patients, and in evaluations done with regard to death row inmates, did you find that that mental retardation diagnosis is consistent with Florida 3.203?

A Um.

Q Let me try to brief that up. A couple more questions, I'm sorry. Let me --

MS. RODRIGUEZ: Your Honor, if I could rephrase, please?

THE COURT: You may rephrase.

MS. RODRIGUEZ: Thank you, your Honor.

BY MS. RODRIGUEZ:

Q You have testified in these proceedings prior --

A Yes.

Q -- in other 3.203 proceedings?

A Yes.

Q And you have conducted other evaluations, if you will, with other defendants?

A Yes.

Q And you have assessed both their I.Q. and their adaptive behavior?

A Yes.

Q And you have used the Vineland as an

instrument to do that with?

A Yes.

Q And the Vineland requires the assessments to be done using informalities, as you did with in this case?

A Yes, respondents familiar with the person, yes.

Q And there is nothing about your evaluation in this particular case that is different or unique in any way from others that you have undertaken, in your history?

A Well, no, in the sense that I always talk to family, if family is available, that knew about the person prior to the age of 18. I have done adaptive behavior testing with prison guards before, current adaptive testing. I didn't do it in this case. I don't really know why I didn't do it. It's been seven years. I'm not sure if Mr. Pinkard said no, or what. But I did not interview a Department of Corrections person.

What I did was I talked to sister about pre-18. I talked to sister -- did adaptive behavior testing with sister. In Mr. Hall's adulthood, prior to coming to prison, and Mr. Hall's brother in adulthood, prior to coming to prison.

Q And you wrote a report with regards to this

case?

A Yes.

Q And in that report, you have indicated that it is your opinion that on the issue of mental retardation, that Mr. Hall has some deficiencies?

A My opinion is that he would qualify for a diagnosis of mild mental retardation.

MS. RODRIGUEZ: Your Honor, that concludes my questions of the witness. I simply wish at this time to admit in the record the report itself that Dr. Prichard has been referring to. And we have removed the information from the -- Mosman and made that separate so that we can mark that with the clerk.

THE COURT: That would be marked for ID but not admitted. The other part as I understand it the state — I don't want to speak for the state. What's the state's position on the other part?

MR. IATTI: Judge, the only problem with Dr. Prichard's report, although the idea of admitting his report after he spent the last two hours testifying about his report, I submit is superfluous at this point, and hearsay, but we can have that debate later. His report includes a reference to Dr. Mosman's materials. So, to the

extent that his report makes reference to that matter, I object.

However, I understand there is no way to excise that and admit his report. As long as that is admitted over my objection, to that part that references Dr. Mosman's testing. But I can't -- it can't be excised.

THE COURT: I don't know any way to excise it. Are you -- do you object to the report coming in? I mean just generally?

MR. NUNNELLEY: Can we have just a minute, Judge?

THE COURT: Yes.

MR. TATTI: Judge, Mr. Nunnelley points out --

MR. NUNNELLEY: Do you want me to do it?

MR. TATTI: That's okay. I can repeat what you said. Mr. Nunnelley correctly points out that Dr. Prichard was able, during the course of his testimony, to elaborate and explain as to the extent to which he relied on Dr. Mosman's findings in arriving at his own. His written report is completely bereft of any written explanation in that regard. For that reason, I would object to its admission. There is no way to separate out -- I mean, he's done it with his testimony. There is

nothing in his report virtually that has not been testified to, if not read by counsel to Dr. Prichard. So I would object to the admission of the written report.

THE COURT: I will sustain that objection. I think that the report should be marked. It should be listed with the records as offered but not admitted. I think in addition to the hearsay problem, hearsay within the hearsay that you have complained about, there is the problem of it being cumulative and redundant. And, you know, after we spent the morning allowing the witness to testify, to then put back in his record, just seems redundant and cumulative and overkill. So, I -- I'm going to sustain the objection in that regard, as to the report.

MS. RODRIGUEZ: Your Honor, just so the record is clear, I want to make clear that the early data of the report with regards to the notice on the -- the report is important from the defense standpoint in terms of notice to the state as to all of the testimony involving Dr. Mosman. And having said that, we wanted to have it be part of the record --

THE COURT: It can be part of the record in the capacity of being offered but not admitted. So

it can be marked. It can be handed to the clerk. And my understanding is they have a separate portion of offered but not admitted.

MS. RODRIGUEZ: I understand, your Honor. I just want to register my objection to it not being part of the record.

THE COURT: Understood. Being admitted is what you mean, because it will be part of the record.

MS. RODRIGUEZ: Yes, sir, I apologize.

THE COURT: Very good. Noted. The Court's ruling is the same.

THE CLERK: Your Honor, what about the other material?

THE COURT: Other material? Yes, are you are offering that?

MS. RODRIGUEZ: That was already offered.

THE CLERK: It was offered but I don't think it —

THE COURT: It was offered, but I'm not sure it was actually admitted.

MS. RODRIGUEZ: We were trying to redact -- the state said they had no objection if we took out the report of Dr. Mosman.

THE COURT: Right.

MS. RODRIGUEZ: So I had my assistant take out the report. And now the state has an objection to the report itself.

THE COURT: You want to take out Dr. Mosman's material and offer that separately, which would be denied, but it will be part of the record.

MR. TATTI: She's just saying you have not formally --

THE CLERK: We need to formally --

THE COURT: Now I think you have everything else, you pulled aside Dr. Pinkard's [sic] report, we pulled aside the information that was in that report?

THE CLERK: Yes, your Honor.

THE COURT: Once we have pulled Dr. Pinkard's report out -- we have done that. So then the rest, you are offering, does the state have an objection?

MR. TATTI: Yes.

(Defendant's Exhibit 5 received in evidence.)

THE COURT: The bulk of the other material relied upon by Dr. Prichard will be in evidence as state's?

THE CLERK: 5. Defendant's 5.

THE COURT: As what?

THE CLERK: Defendant's 5.

THE COURT: Now, does the state have any questions and Cross-Examination?

MR. TATTI: Yes, sir.

THE COURT: Now, in all fairness to everybody, you need to — before you start asking questions, figure out are you asking these questions as part of your response to the proffer? Or are you asking these questions open-ended? Because it makes a huge difference, I think, based on the way this trial is proceeding.

MR. TATTI: Frankly, Judge, based on the way the hearing has proceeded, it is kind of impossible for me to sort out.

THE COURT: So long as you announce what you are doing it as, I will honor that. But I'm warning you that if you ask open-ended questions, you could cause -- you know.

MR. TATTI: You know me. I won't do that.

THE COURT: What are you going to do? What do you want to do?

MR. TATTI: My intention is to begin my Cross-Examination with some questions relating to Dr. Prichard's approach to his evaluation of Mr. Hall as a clinician and conclude my Cross-Examination with some questions to

Dr. Prichard from the perspective of the legal requirements, which I am fairly certainly Dr. Prichard is aware of, as he was a participant in the *Cherry* case.

THE COURT: Again, I am treating these as open-ended questions not restricted to the proffer.

MR. TATTI: That's fine. May it please the Court?

THE COURT: Absolutely.

CROSS-EXAMINATION

BY MR. TATTI:

Q Good afternoon, Dr. Prichard.

A Hello, sir.

Q Let's start and establish one ground rule here. Do you recognize that there is a difference between the definition of mental retardation that appears in the DSM-IV-TR, versus the legal definition of mental retardation under Florida Statute 921.137 and in Rule of Procedure 3.203?

A Yes.

Q And you are aware of the difference?

A Yes.

Q All right. From a clinician's perspective, and if I understood your testimony, when you received this report, you were asked to do a confidential

evaluation of Mr. Hall; is that correct?

A That's the way I recall it, yes.

Q That's in fact how you titled your report.

A Yes.

Q And you approached that report as a clinician; is that correct?

A That's correct.

Q So you did what a clinician is supposed to do?

A In my opinion, yes.

Q Okay. Now, did I understand you that you received no material that included I.Q. scores, I.Q. testing from Mr. Hall as a child from his school age years? You got some general comments, but no I.Q. testing; is that correct?

A That's correct.

Q In fact, the first I.Q. test that you came across in the material you found was a beta I.Q. test administered by the Department of Corrections to Mr. Hall in December of 1968; is that correct?

A That's correct.

Q Okay. Now, you used the phrase "state-of-the-art" to describe the Wechsler test, the WAIS?

A Um-hmm.

Q The beta is not the state-of-the-art; is that

correct?

A That's correct.

Q But it's out there?

A Yes, it's out there. It's used primarily in institutions, like Department of Corrections. It's a down-and-dirty measure where you can administer intellectual testing to a lot of people at once. It's group administered, so you can get kind of an idea of people's I.Q.s, a general idea.

Q It wouldn't be appropriate for a clinician practicing today to administer such a test?

A Not to administer it for purposes of determining whether a person is mentally retarded.

Q Fair enough. That beta test has undergone revisions over the years; is that correct?

A That's correct, yes.

Q And what started in the '30s as a beta test has now come to a Beta III; is that correct?

A That's correct, yes.

Q With an attempt each time it's revised to make it better, to make it more relevant to a clinician; is that correct?

A Just keep updated with -- just like the regular intelligence tests, like the Wechsler scales, to keep it updated in terms of cultural and social issues,

to make it more valid and more reliable. That's the effort anyway.

Q That test administered to Mr. Hall which appeared in the prison records that you reviewed --

A Right.

Q -- is dated December 23rd, 1968, showed a beta I.Q. score of 76; is that correct?

A That's correct.

Q And then the next I.Q. test that you found in the material you were provided by CCRC was a reference in February of 1969 from a Department of Corrections educational counselor's report that Mr. Hall had an I.Q. of 76, but it didn't refer to the instrument by which that test, that score, was derived; is that correct?

A That's correct.

Q So you got December '68, February '69, same score, 76?

A Correct.

Q Then you made reference on Direct Examination, during the proffer, to a notation in a vocational report at an I.Q. of 68?

A Correct.

Q Isn't it true that that reference is in parentheses and it literally says in parentheses, 68, comma, E-T-C?

A Yes.
Q As in "et cetera"?
A Yes.
Q And you put that in quotes in your report?
A Correct.
Q But there is absolutely no reference to how that number was arrived at?
A That's correct.
Q It doesn't identify the testing instrument that was used --
A Correct.
Q -- where it came from?
A No, the testing instrument is not identified, just I.Q. of 68.
Q So you have got 76, 76, this reference to a 68. And then in January of 1979, this Kent test that you referred to during Direct Examination on the proffer --
A Right.
Q -- which revealed an I.Q. of 79; is that correct?
A That's correct.
Q Okay. Now, would you agree with the general statement that mental retardation is a static condition that generally shows little change over the course of an

individual's life?

A Yes.

Q You, in fact, wrote that in your report, didn't you?

A Well, if you say so. But, yes, I would agree with that statement.

Q It's one of the last sentences in your report.

A I don't argue with that. I agree with that statement, yes.

MR. TATTI: May I approach?

THE COURT: You may.

BY MR. TATTI:

Q The second-to-the-last paragraph?

A That's correct, I did write that.

Q Okay. You talked about Dr. Lewis?

A Um-hmm.

Q Correct?

A Correct.

Q Barbara Bard?

A Right.

Q Were you aware as to how Dr. Lewis came to evaluate Mr. Hall, the circumstances under which Dr. Lewis evaluated Mr. Hall?

A I can't recall. I don't think I knew the circumstances. Sitting here today, I don't know the

circumstances.

Q So you weren't aware that Dr. Lewis and a team of experts from N.Y.U. had arrived on Florida's death row for the purpose of doing research on the death penalty --

MS. RODRIGUEZ: Objection, your Honor, he's been asked and answered. He doesn't recall.

MR. TATTI: That's a matter of record in this case. Your Honor has heard the testimony.

THE COURT: But you are arguing facts that are not in evidence, and you are testifying. I will sustain the objection.

BY MR. TATTI:

Q So you don't know how it was that Dr. Lewis arrived to meet Mr. Hall?

A No.

Q Do you know whether or not Marilyn Feldman -- whose report you reviewed; is that correct? You reviewed a report from Marilyn Feldman?

A Yes.

Q That included an I.Q. score from a test she administered on September 10th, 1986; is that right?

A That's correct.

Q Do you know whether Marilyn Feldman was part of Dr. Lewis' team?

A I don't know. The only reason I think she was and I think the only reason I know about this team thing that you are mentioning -- it didn't interest me -- was that Dr. Mosman referenced it, the team which included people like Ms. Feldman.

Q All right. Ms. Feldman administered a WAIS, a Wechsler Adult Intelligence Scale-Revised; is that correct?

A That's correct.

Q Which is, as you referred to it, the state-of-the-art at that time?

A Yes.

Q And the I.Q. score she obtained was 80; is that right?

A That's correct.

Q So between 1968 and 1986, Freddie Hall, on identifiable testing instruments, got I.Q. scores of 76, 79, and 80; is that right?

A Yes, on the three we mentioned, yes.

Q And based on what you said on Direct Examination about the standard error measurement, those are statistically, for the purposes of a clinician, identical scores, are they not? They are within the plus or minus four?

A See, the problem with that is it's probably

not the same scale when you are talking about a beta I.Q. and a Kent I.Q. They probably don't have the same standard of error on all the instruments. But, you know, the score reported on the beta, the Kent and the Wechsler, between 68 and 86, they are virtually identical scores, you know, if you eliminated the consideration of the beta and the Kent not really being scores that you should pay that much attention to.

Q Would you agree that the scores on the I.Q. testing administered to Mr. Hall dramatically changed after 1987, 1988?

A Ten-point difference or so, 11-point difference, I think is the worst case, you are referring to the high of 80 and then the low of Mosman, which was 69, and then me a 71 and I think a 73 and maybe a 74. Is that what you are referring to —

Q Yes, sir.

A — subsequently?

Yeah, I mean, is that substantially different? Statistically, I don't know. It's probably right on the cusp of being significant. I don't know. It's between 6 and 11 points. So, you know, probably some of those scores are substantially different and others aren't substantially different.

Q But you would agree there was a consistency in

the scores, the available I.Q. scores for Mr. Hall prior to '87, '88 versus the ones after '87, '88. There is a difference in those two sets of scores.

A Yes, sir. I would agree with that. This is the thing, though; this is the issue: You are talking about a Kent I.Q. and a beta I.Q. And you can't really fairly compare what somebody gets on those kinds of I.Q. measures relative to, say, the Wechsler —

Q Okay. Throw them out. How do you factor in that 80?

A It's a difficult one to factor in. It really is. It's an outlier when you compare it to all the other ones that came after that.

Q Do you have any idea what was going on with Mr. Hall's case in '87 and '88?

A I'm sure I did, when I was first doing it, just in terms of the chronology of what I was reading. But right now, sitting here, I don't know.

Q So you don't know what the legal significance or the legal activity going on with regard to Mr. Hall was at that time?

A Sitting here today, no, I don't.

Q And you don't know why Dr. Toomer or Dr. Pincus were sent to talk to Mr. Hall when they were sent to talk to Mr. Hall?

A Not really, no.

Q And you don't know whether they were introduced to Mr. Hall in the manner that you were introduced to Mr. Hall; is that correct?

A That's correct.

Q And you were introduced to Mr. Hall by Mr. Pinkard; is that correct?

A Yes, I was hired -- you mean was I hired by?

Q Well, didn't he go to the prison with you and say, Mr. Hall, this is Dr. Prichard, he works for me, he's going to file a report that's confidential, that I'm going to use, and if it's something helpful, it might appear in court?

A I don't know if he did or not. I really can't recall.

Q Didn't you write that in your report?

A If I did, okay. I'm telling you I can't recall. It's been seven years. If Mr. Pinkard came with me, I don't recall that.

Q I'm referring to the second page of your report. The section entitled Notification of Confidentiality. Does that refresh your recollection?

A Yeah. I mean, in terms of — it does in terms of this being a confidential assessment, that it would be provided only to Eric Pinkard of CCRC. I don't know

that Mr. Pinkard was with me when I did the evaluation. I just don't remember that.

Q Okay. But somebody explained to Mr. Hall that you were working for his lawyer?

A I'm sure when I did the notification of confidentiality, I told him exactly what's reflected there, that I was hired by CCRC, his attorney.

Q All right. Now, after '87, '88, there are a series of scores that were included in the material that were given to you; is that correct?

A That's correct.

Q In fact, you have a score from Dr. Krop who administered a WAIS-R on -- in March of 1990?

A That's correct.

Q That score being 73?

A Correct.

Q You have Dr. Mosman's score, which you testified to on the proffer, which was administered -- that test was administered in November of 2001; is that correct?

A That's correct.

Q And then you have your own testing which was completed I believe you said August 15th, 2002; is that correct?

A Correct.

Q And you got a 71?

A That's right.

Q Were you ever provided with an I.Q. at the time that was conducted on Mr. Hall after you completed your examination?

A I was -- I was given a report or something from a Dr. Sesta that was administered after I assessed him.

Q And did you, in fact, get a whole test instrument, the raw data?

A Yes, it was recently. Probably within the last six months, I would say.

MR. TATTI: Your Honor, may I have this exhibit marked as State's Exhibit?

THE COURT: For ID?

MR. TATTI: Yes, sir, at this point.

(State's Exhibit A marked for identification.)

MR. TATTI: May I approach the witness?

THE COURT: State's --

MR. TATTI: This is State's Exhibit A for identification.

THE COURT: No, I mean is the defense aware of what you're --

MR. TATTI: I got it from her.

BY MR. TATTI:

Q I'm handing you what's been marked for identification as State's Exhibit A. Do you recognize that?

A Yes.

Q State's Exhibit A is the actual testing instrument, the raw data associated with the administration of a WAIS-IV, the newest version of the Wechsler test; is that correct?

A That's correct.

Q And that test —

MS. RODRIGUEZ: Just a moment. Just so the record is clear, your Honor, we did not provide that particular test. That was provided by Dr. Sesta directly to the state's expert, Dr. McClaren. So I'm not sure where all this is going. It's not listed in any way on any of our exhibit lists as far as — their exhibit list as far as something they were going to introduce today to the Court. We did provide it to their expert.

So I want to be sure that the record is clear that it was never in our possession. I don't have a copy of that document. So I would like a copy if that's going to be introduced by the state here.

MR. TATTI: That's fine.

THE COURT: I'm not aware of where they are going. I'm not aware of what the document is.

MR. TATTI: If he'd have told me he hadn't seen it, we wouldn't have gone any further than that. But when he acknowledged that he received a copy of it, I believe it is now relevant.

MS. RODRIGUEZ: It just was not part of our presentation nor in the record, your Honor. So the state is presenting this as new evidence in the case.

MR. TATTI: I will be happy to give her a copy.

MS. RODRIGUEZ: I just need a copy.

THE COURT: If that's your objection, as long as you are going to get a copy, I think we have resolved it. Go ahead.

BY MR. TATTI:

Q That is an I.Q. test, WAIS-IV, administered to Mr. Hall after the date of the testing you performed; is that correct?

A That's correct.

Q In fact, it was a test that was administered on November 25th, 2008, according — by its face; is that correct?

A That's correct.

Q And an I.Q. score was obtained as a result of that test, full-scale I.Q. score; is that correct?

A That's correct.

Q And it was 72; is that correct?

A Yes.

Q So, would it be fair to say that since '86, '87, the four -- of the four known I.Q. tests that have been administered to Mr. Hall, only one of them is below 70?

A The obtained score, yes, that would have been Dr. Mosman with a 69.

Q Right. As you testified during the proffer, as a clinician, you are required to take into account an error measurement; is that right?

A That's correct.

Q So a 69, to you, as a clinician, can go as low as 65?

A Around there, yes.

Q And as high as 74?

A Right.

Q And to you, as a clinician, there is absolutely no difference among those scores because of the standard error measurement?

A Right. They are virtually identical. Four points separate the lowest at 69 from the highest at 73.

Q And that's the world you operate in as a clinician, right?

A Right.

Q Now, would you agree that at least in terms of the verbiage, the definition of mental retardation that appears in the DSM in its current — the DSM-IV-TR —

A Um-hmm.

Q -- is extremely similar to the verbiage that appears in Florida Rule Criminal Procedure 3.203 and in Florida Statute 921.137?

A Yes.

Q There is now a little difference in how that definition is actually put into effect, would you agree with that?

A Yes.

Q But the words are almost identical?

A Right.

Q And the words in both the DSM and in the rule and in the statute require that you establish a significantly subaverage general level of intelligence; is that correct?

A That's correct.

Q With deficits in adaptive functioning -- that's the second part, right?

A Correct.

Q — with an onset prior to age 18, that's the third part?

A That's right.

Q Would you agree that both the rule and the DSM require that to diagnose under the DSM as mentally retarded, deficits in adaptive functioning must be established concurrently with the I.Q. portion of the test?

A Yeah, that word is in there, "concurrent."

Q And your testimony was you did not address his current level of adaptive functioning; is that right?

A In 2002. That's correct, yes.

Q Okay. So would you agree that to diagnose Mr. Hall under the DSM as mentally retarded at the time you evaluated him, based on what you did was, perhaps, premature in the absence of any inquiry into his present, that is 2002, level of adaptive functioning?

A "Premature"? I don't know if I would characterize it as premature. I understand what you are saying. The problem becomes, you know, trying to assess adaptive behavior in the context of DOC. I don't know why it wasn't done in 2002. I really don't recall all that went on in this case. And I did most of my work at the end of 2002 on this case. I just don't remember what went on. But . . .

Q But you acknowledge it wasn't done?
A It was not done in this case, and I'm not sure why.
Q Okay. All right. That's the clinician's issues?
A Right.
Q Now, I want to talk about legal issues. You were one of the experts appointed by the court in the *Cherry* case; is that correct?
A That's correct.
Q In fact, you were appointed by the Court on behalf of the State of Florida?
A That's correct.
Q Along with another clinician who was appointed for the defendant?
A That's correct.
Q Do you remember his name?
A Dr. Burston.
Q Right. And Dr. Burston administered an I.Q. test to Mr. Cherry; is that correct?
A That's correct.
Q And arrived at an I.Q. score of 72 on Mr. Cherry; is that correct?
A I believe that's right, yes.
Q And you relied on Dr. Burston's I.Q. testing

in reaching your conclusions; is that right?

A That's correct.

Q And you concluded, as you were appointed as a clinician, that Mr. Cherry was mentally retarded; is that correct?

A Right. I also did adaptive behavior testing and concluded based on the recent result of the intellectual measure in the adaptive behavior test —

Q But the relevant I.Q. score for Mr. Cherry was 72?

A That's correct.

Q That both you and Dr. Burston used in arriving at your diagnosis that Mr. Cherry was mentally retarded?

A That's correct.

Q And you know the result of the *Cherry* case, don't you, Dr. Prichard?

A Yes, I do.

Q And you are aware that the Florida Supreme Court, in no uncertain terms, interpreted that ruling and that statute to require that a defendant, in order to be found mentally retarded under Florida law --

MS. RODRIGUEZ: Objection, your Honor, as to the question calling for a legal opinion here.

MR. TATTI: He said he knows. I asked him if he knew.

THE COURT: Ask your question. Overruled.

BY MR. TATTI:

Q Are you aware that the Supreme Court now has made it very clear that, under the law, versus your world as a clinician, that an I.Q., in order to be considered mentally retarded under the law as it relates to the death penalty, that the I.Q. score has to be 70 or below?

A Yes, I am aware that's a bright-line cutoff.

Q And the Supreme Court doesn't care about standard error measure?

A Right.

Q They — legislature didn't write about it, so the Supreme Court wasn't interested in it?

A 70 or below. That's it.

Q All right. Would you agree, Dr. Prichard, that under the legal standard, which is what we're here about today, that Mr. Hall does not suffer from significantly subaverage intellectual function based on your revaluation of Mr. Hall?

A I mean, honestly, that's — what I think is up to the Court to decide, not me. I express it as a clinician, try to aid the Court in its decision.

Q But your I.Q. score was 71?

A My I.Q. score was 71, yes.

MR. TATTI: I don't have any more questions.

MS. RODRIGUEZ: I have nothing further, your Honor.

THE COURT: May this witness be excused?

MS. RODRIGUEZ: Yes, your Honor.

THE COURT: Thank you for coming in. You are free to go about your business. If you are under subpoena, you are released from that subpoena.

THE WITNESS: Thank you.

THE COURT: Has the state -- let's go back to the defense. Has the defense rested?

MS. RODRIGUEZ: Yes, your Honor.

THE COURT: Defense rests.

Has the state determined whether they wish to call a witness or witnesses? This is the end.

MR. TATTI: We'll rely on the evidence that's been adduced at the hearing, your Honor.

THE COURT: So you have no witnesses you wish to call, nothing else you wish to present?

MR. TATTI: That's correct. I would offer State's Exhibit A into evidence on behalf of the state.

THE COURT: Now, that is the test of Dr. Sesta?

MR. TATTI: Yes, sir.

THE COURT: What says the defense?

MS. RODRIGUEZ: Your Honor — your Honor, we would object. We did not have this document. We did not have a chance to see the document. Um, we don't object to the testimony that's already in the record with regard to Dr. Sesta having done an evaluation or, you know, even the information that was put on record with regards to the document. But we have not seen the document, ourselves, to be able to deal with all of the information that may be in there. I don't know what's in there at all. So I feel compelled to keep the record clear.

THE COURT: In light of my previous ruling, I will sustain your objection and it will not come into evidence. So list it as offered, marked for ID, but not in evidence.

MS. RODRIGUEZ: And I would remind the state that we do want a copy, because it went expert to expert, and we never had our hands on it.

MR. TATTI: Well, my copy is now in the hands of the clerk, and I have not made any copies of it for concerns of the confidential nature of it —

THE COURT: How —

MR. TATTI: — my copy.

THE COURT: — how many pages is that

approximately?

THE CLERK: Quite a few.

MR. TATTI: 25 or 30, somewhere in that neighborhood.

THE COURT: The Court will volunteer its copier. Madam clerk, if you will at the break or sometime when we finish here, make a copy for the defense, please?

THE CLERK: Yes, sir.

MS. RODRIGUEZ: Thank you, your Honor. We appreciate that.

THE COURT: Now, state's rested. Defense rested. Now, do you want — how do we want to handle closings?

MS. RODRIGUEZ: Your Honor, we did prepare an order, if the Court will recall, we mentioned.

THE COURT: Yeah, it was mentioned yesterday.

MS. RODRIGUEZ: We sent a copy to the state. It was faxed to them on December 1st. I don't know their position with regard to any of the content of it. I think I checked with them at the beginning, and they had not offered an objection that I'm aware of. But I do have a proposed order.

MR. TATTI: Do you have another copy of it?

THE COURT: And I would like a copy of it to

see what it says. Maybe I have an objection, I don't know.

MS. RODRIGUEZ: That's true. Here.

MR. TATTI: Judge, my only response to this, I suppose — my objection is that signing this order would add one, two, three, four, five, six months to a matter that has been pending since 2005. I acknowledge lots of things have happened since 2005, many of which have been earned to my benefit. But prolonging this case to argue a point that I don't think requires a great deal of argument based on the evidence that was presented in this hearing, I think is inappropriate. Six months is an absurd length of time to argue this case.

I'm prepared to make what little argument I have now. And I don't think it would last more than ten minutes, because the matter, I submit, is clear. And I don't need six months to come up with it.

THE COURT: Can we shorten the time period significantly?

MS. RODRIGUEZ: Absolutely, your Honor, we faxed it to the state for the very purpose of adjusting this so that we could have an agreed-upon order today. I apologize.

(Speaking simultaneously.)

MR. NUNNELLEY: If I could respond.

THE COURT: Just a moment, I will let you speak, but don't interrupt.

MS. RODRIGUEZ: That was the purpose of the fax, your Honor. We are more than willing to shorten the time period on the responses. We just simply used an order that we have used in another case. It was not tailored to this particular case.

THE COURT: All right. Well, as I look at this, I'm troubled not only by the time periods but by the number of pages. That's way too many pages on the issue before the Court. It's way too many pages at any time. But on the issue before the Court, it's way too many pages.

MR. NUNNELLEY: That's exactly what I was going to say. I feel an undercurrent of criticism directed at the state for not voicing an objection to this proposed procedure. It's a matter of what will assist the Court. What does your Honor want us or feel is necessary for the state to do to assist the Court in making a decision in an expeditious fashion? If your Honor wants written, we'll do written closing arguments. If your Honor wants to submit the case right now, that fine with

us. If your Honor would prefer oral argument right now, that's fine with us, too. We'll do what the Court desires.

I will -- I agree, I think 60 pages is a lot, the way this case has played out. You know, I think 60, 60 and 30 for filing is long. Again, the way this case has played out -- in a complex case, that was not as clear as this one, these time frames might be appropriate. And, in fact, they are appropriate in some cases when we have a week-long evidentiary hearing with 15 or 20 witnesses.

We don't have that here. This is a simple case. I would suggest there is no real need for any further closing arguments at all. I think the case could be submitted right now. Your Honor knows what the issues are.

MS. RODRIGUEZ: Your Honor, I would point out to the Court that this case was simple at the outset, but it became quite difficult due to the various motions filed on the very first day, the motion in limine, proffer, everything that occurred in the proceedings. I would suggest to the Court that we are not unwilling to change the time period, but we would suggest to the Court that

there is more to write about than the state would present with regards to this issue. And because of that, I would suggest to the Court that we feel that it is necessary for us to do written closings.

Again, I'm not saying we can't reduce the amount of pages, but we would ask the Court to take all of that into consideration because the proffer and the presentation of the evidence and all of that, that matter should be addressed by us to the Court in our closings.

THE COURT: Well, let me tell you what I'm thinking. I think it's generally easier to have a written document to work from when you are doing an order of this nature. So I'm not troubled by, necessarily, by the closing argument, although if both of you are ready to do your oral closing argument now or right after lunch, I would be okay with that.

But since this is the way you want to go, I'm not opposed to a written format for closing argument. This proceeding is going to have to be transcribed one time or the other, I'm sure. I'm sure, you know, somebody is going to want an appeal, no matter what I do. So we might as well get the transcript working. I do need to ask the

court reporter if she can transcribe this in 30 days?

COURT REPORTER: Oh, yes.

THE COURT: Okay. So 30 days I think is a reasonable period of time. Then I think the defendant shall file a closing argument -- and I think 60 pages is way too many. I'm thinking more like 15 is about what it needs to be. Again, this is not your argument to -- if that's where this is headed, to the Florida Supreme Court or the U.S. Supreme Court, 60 pages would bury me. I need something like 15.

And I want it — that's 15 pages. I guess, I'm going to have to rewrite it. I think that your closing argument from the defense should be within 30 days of receiving the transcript or say 30 days from the date that the clerk files the transcript with the Court. I mean, that's probably more — I mean, the court reporter files the transcript with the Court. That's an ascertainable time. So, within 30 days, that's when you are going to do that. I know we're coming into the holiday season. But 30 days, still --

MS. RODRIGUEZ: That's fine, your Honor.

THE COURT: Then how much time does the state

need?

MR. NUNNELLEY: We'll ask for 30 and try to do it in 15, Judge. I'm not sure exactly when it's going to fall.

THE COURT: I know.

MR. NUNNELLEY: If we can have 30, we'll try to file quicker, just because I don't know what's going to get on the calendar.

THE COURT: Okay. So you want 30.

MR. TATTI: I'm sure we can limit our response to 15 pages, Judge.

THE COURT: Right. You get 15 also. Then the rebuttal, since you have the burden of proof, that makes sense, the defendant shall rebuttal no more than -- I think that needs to be down to 10 or 15 days, something like that. How many days?

MS. RODRIGUEZ: Fifteen, your Honor, just because we don't know, as well, where we're going to be.

MR. NUNNELLEY: Judge, can I ask something here?

THE COURT: Sure.

MR. NUNNELLEY: If we can agree to file these by mail and by e-mail? In other words if the defense will serve me by e-mail, that means I don't

have one that gets mailed on a holiday Friday and I don't get it until the next week. If they could e-mail me their document and indicate service by e-mail and regular mail in their certificate of service, we'll do the same thing and we will e-mail file with the Court, as well. Does that make sense?

MS. FAGAN: We won't do e-filings for these.

MR. NUNNELLEY: We could e-mail back and forth.

MS. RODRIGUEZ: I'd be happy to do that to assist Mr. Nunnelley, but I'm hesitant to put that into any written format.

THE COURT: You are just trying to speed up the time?

MR. NUNNELLEY: Judge, what I'm doing is something that's frequently done, and Ms. Rodriguez knows it, in death warrant cases. We routinely e-mail documents back and forth. I know the Court -- I don't know if Hernando accepts e-filings or not. I think you said you don't.

MS. FAGAN: Not yet.

THE COURT: No. I think in probate, maybe, they are talking about it.

MS. FAGAN: Talking about it.

MR. NUNNELLEY: But what I'm saying is we can put in this order that they will serve me by e-mail and I will serve them by e-mail, because I would certainly suggest if the Florida Supreme Court does that, which they do, this Court can also put that in the order without getting in trouble.

MS. RODRIGUEZ: Your Honor, I don't practice by e-mail. I do provide courtesy copies when I'm asked, and I can only represent to the Court that I'm not familiar with the rules permitting that.

MR. NUNNELLEY: Then I will withdraw the request, your Honor. It's become too much of an issue.

MS. RODRIGUEZ: I'm happy to do it.

THE COURT: No. We'll just -- we'll use snail mail.

MR. NUNNELLEY: So that means I get the additional five days that I get for mailing, since she's insisting on not doing it any other way.

THE COURT: That's fine, that's right. I think we'll be okay with this procedure.

So we have got up to 30 days for the transcript. As soon as it's received, then you have 30 -- defense has 30 days. Your brief will be no more than 15 pages. Then the state has up to 30

days from receipt and their brief will be no more than 15 pages. And then the defense has rebuttal in 15 days and their closing -- I think their rebuttal should be 10 pages.

MS. RODRIGUEZ: Yes, your Honor.

THE COURT: All right. Then we get to do our part as efficiently and as expeditiously as possible. But please understand that we are, like everyone, covered up. But we'll move it as quickly as possible.

Now, I will redo this order, since I have just marked it all up. I will get it redone and send it out.

MS. RODRIGUEZ: I have a spare copy.

THE COURT: We have got to change all the numbers.

MS. RODRIGUEZ: I will say to the Court, and Mr. Nunnelley may have seen this, as well, that you, the Court, can change the numbers and initial each one of those and file it with the clerk.

THE COURT: I will get it done right now. If the court reporter will start running -- start the transcript as soon as you possibly can, that will get us going.

MS. RODRIGUEZ: We have provided our

information.

MR. TATTI: Can I request Ms. Marshall, that she notify the office of the state attorney when she has sent the transcript to the clerk because there is sometimes a lag.

THE COURT: If you will provide a card, I'm sure she will. Because there are lots of State Attorney's Offices, and I'm sure you want it sent to you. E-mail him or let him know that's been filed.

COURT REPORTER: Who do I bill?

THE COURT: Good question. The clerk [sic] wants to know who she bills? That's a great question.

MR. NUNNELLEY: What did we do in Hildwin, Judge?

COURT REPORTER: We got a purchase order from CCRC.

MS. RODRIGUEZ: We have provided a card to the clerk and if you will let us know as well when it's filed with the Court, we would appreciate that. We generate a purchase order, your Honor, and we take care of the fees.

THE COURT: So have it billed to your office?

MS. RODRIGUEZ: Yes, your Honor. If you would

contact our office, we provided the name, we'll give you the purchase order number so the state pays for it. And then I believe that the State Attorney's Office gets the file copy charges.

THE COURT: Agreed? Anything else?

MR. NUNNELLEY: No, your Honor.

MS. RODRIGUEZ: No.

MR. TATTI: I don't believe so.

THE COURT: Well, to the extent that everyone can, please have a happy holiday. If there is nothing further, court is adjourned.

MR. NUNNELLEY: Thank you, Judge.

MS. RODRIGUEZ: Thank you, your Honor.

THEREUPON, THE HEARING WAS CONCLUDED AT 12:59 P.M..

OPPOSITION BRIEF

ORIGINAL

Supreme Court, U.S.
FILED
JUL 18 2013
OFFICE OF THE CLERK

DOCKET NO. 12-10882

IN THE SUPREME COURT OF THE UNITED STATES

FREDDIE LEE HALL,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

Respondent states the question presented in the following way:

> WHETHER THIS COURT SHOULD DECLINE TO EXERCISE ITS CERTIORARI JURISDICTION TO REVIEW FLORIDA'S DEFINITION AND APPLICATION OF THE INTELLIGENCE (IQ) PRONG OF THE THREE-PART DEFINITION OF MENTAL RETARDATION WHICH DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT; WAS DECIDED CORRECTLY ON ADEQUATE AND INDEPENDENT STATE LAW GROUNDS; AND THAT CANNOT BE RESOLVED WITHOUT EXTENSIVE FACTUAL DISCUSSION THAT HAS NO IMPACT ON ANY OTHER CASE?

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DOCKET NO. 12-10882

IN THE SUPREME COURT OF THE UNITED STATES

FREDDIE LEE HALL,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

COMES NOW the State of Florida and responds as follows to Hall's petition for writ of certiorari to the Florida Supreme Court.

CITATION TO OPINION BELOW

The decision at issue is reported as *Hall v. State*, 109 So. 3d 704 (Fla. 2012). That decision is attached as Appendix A. The underlying trial court order is attached as Appendix B.[1]

STATEMENT OF JURISDICTION

Hall says that this Court's jurisdiction is based on 28 U.S.C. §2254, which is reproduced at length in the petition. That statute sets out the jurisdiction of the federal courts to consider a petition for writ of habeas corpus filed by a state

[1] Hall has attached three (3) additional Florida Supreme Court decisions as appendices to his petition. Those decisions are not under review here.

inmate -- it has nothing to do with this Court's certiorari jurisdiction. This Court's discretionary jurisdiction is set out in 28 U.S.C. §1257.

Hall's petition, construed as a whole, does not appear to be an attempt to file an original application for writ of habeas corpus in this Court. The petition is styled as a petition for writ of certiorari, and is generally drafted in "certiorari terms." The exercise of this Court's jurisdiction is unjustified in this case.

CONSTITUTIONAL PROVISIONS INVOLVED

Hall says that the Eighth Amendment to the Constitution of the United States is at issue in this proceeding. That Amendment is correctly reproduced in the petition. However, to the extent that Hall says that 28 U.S.C. §2254 is involved, that assertion is inaccurate.

RESPONSE TO PROCEDURAL HISTORY

In its 2012 decision affirming the denial of Hall's prior post-conviction relief motion, the Florida Supreme Court summarized the facts of the case and the procedural history in the following way:

> Freddie Lee Hall was tried and convicted in Putnam County for the 1978 murder of Karol Hurst. *Hall v. State* (*Hall I*), 403 So. 2d 1321, 1323 (Fla. 1981). We upheld Hall's conviction and sentence on direct appeal. *Id.* at 1325.
>
> On September 9, 1982, the governor signed Hall's first death warrant, effective for the week of October 1

through 8, 1982. *Hall v. State* (*Hall II*), 420 So. 2d 872, 873 (Fla. 1982). Hall filed a motion to vacate, a petition for writ of habeas corpus, and an application for a stay of execution, all of which were denied. *Id.* Hall then sought habeas corpus relief in the federal court, which was denied without an evidentiary hearing. *Hall v. Wainwright* (*Hall III*), 733 F.2d 766, 769 (11th Cir. 1984), *cert. denied*, 471 U.S. 1107, 105 S.Ct. 2344, 85 L.Ed.2d 858 (1985). Hall appealed to the Eleventh Circuit Court of Appeals, which reversed in part and remanded for a hearing. *Id.* at 777 (finding that Hall was entitled to a hearing on the issues of his absence from the courtroom and whether he deliberately bypassed his ineffective assistance of counsel claim).

On remand, the district court again denied relief, finding that Hall's absences from trial occurred during non-critical stages and were therefore harmless, and that he deliberately bypassed the ineffective assistance of counsel claim. *Hall v. Wainwright* (*Hall IV*), 805 F.2d 945, 946 (11th Cir. 1986), *cert. denied, Hall v. Dugger*, 484 U.S. 905, 108 S.Ct. 248, 98 L.Ed.2d 206 (1987). The Eleventh Circuit affirmed the denial. Id. at 948. Hall then petitioned this Court for habeas corpus relief based on the United States Supreme Court's ruling in *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) (holding that all mitigating factors, not just statutory mitigation, should be considered by the judge and jury). This Court held that any error in the sentencing was harmless. *Hall v. Dugger* (*Hall V*), 531 So. 2d 76, 77 (Fla. 1988).

The governor then signed a second death warrant on September 20, 1988. *Hall v. State* (*Hall VI*), 541 So. 2d 1125, 1126 (Fla. 1989). Hall filed his second 3.850 motion, alleging error under *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). The trial court found that this Court's ruling on the issue in *Hall V* was a procedural bar to Hall raising the claim again. *Hall VI*, 541 So. 2d at 1126. We disagreed, stating that the "case involves significant additional non-record facts" that had not been considered on habeas review. *Id.* Ultimately, we determined that a *Hitchcock* error occurred, and that such error could not be considered harmless. *Id.* at

1128. We then vacated Hall's death sentence and remanded for a new sentencing proceeding. *Id.*

During the resentencing, the trial court found Hall mentally retarded as a mitigating factor and gave it "unquantifiable" weight. The court again condemned Hall to death, and we affirmed. *Hall v. State* (*Hall VII*), 614 So. 2d 473, 479 (Fla. 1993). Hall sought postconviction relief, which was denied. *Hall v. State* (*Hall VIII*), 742 So. 2d 225, 230 (Fla. 1999). We affirmed the denial. *Id.* at 230. In finding that the trial court properly denied Hall's claim that the court erred in finding him competent to proceed at the resentencing, we stated "While there is no doubt that [Hall] has serious mental difficulties, is probably somewhat retarded, and certainly has learning difficulties and a speech impediment, the Court finds that [Hall] was competent at the resentencing hearings." *Id.* at 229.[2]

After *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), was decided, Hall filed a motion to declare section 921.137, *Florida Statutes* (2004), [FN1] unconstitutional. While the motion was pending, we adopted *Florida Rule of Criminal Procedure* 3.203 as a mechanism to file *Atkins* claims. Hall timely filed such a claim on November 30, 2004. No action was taken on the motion until, on March 27, 2008, Hall filed a motion to prohibit relitigation of the mental retardation issue, which was denied. The court then held an evidentiary hearing on Hall's successive motion to vacate his sentence.

> [FN1] Section 921.137, *Florida Statutes* was enacted during a regular session of the Florida Legislature in 2001. *See* ch.2001-202, § 1, *Laws of Fla.* The statute has been amended once to transfer duties from the Developmental Disabilities Program Office within the Department of Children and Family Services to the Agency for Persons with Disabilities. *See* ch.2006-195, § 23, *Laws of Fla.*

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[2] Lest there be any doubt, the "mental retardation" claim at issue in this proceeding was solely in the context of a competency claim, and was decided as such.

> At the evidentiary hearing held on December 7 and 8, 2009, Hall presented testimony from Dr. Valerie McClain, who testified that she did not obtain Hall's IQ; Lugene Ellis, Hall's half-brother, who testified about his recollection of Hall as a child; James Hall, Hall's brother, who testified regarding Hall's problems with reading, writing, and caring for himself; Dr. Harry Krop, who testified that Hall's IQ using the Wechsler Adult Intelligence Scale Revised was 73 and that a prior result on the same test given by Marilyn Feldman resulted in a score of 80; and Dr. Gregory Prichard, who testified that Hall scored a 71 on the Wechsler Adult Intelligence Scale Third Edition (WAIS-III). Hall sought to introduce a report compiled by then-deceased Dr. Bill Mosman through Dr. Prichard, but the court denied it and only allowed Hall to proffer the report for the record. After reviewing the evidence presented, the court determined that Hall could not meet the first prong of the mental retardation standard to establish his mental retardation—an IQ below 70. The court denied relief in an order issued May 26, 2010, and entered an amended order on June 16, 2010.
>
> Hall appeals the court's denial, raising four claims: (1) the trial court's finding that Hall is not mentally retarded is not supported by competent, substantial evidence; (2) the trial court erred in granting the State's motion *in limine* that limited the evidence Hall could present on his mental retardation claim; (3) the trial court erred by striking Dr. Mosman's report; and (4) the trial court should have imposed a life sentence based on the doctrine of collateral estoppel. Because we find that there is competent, substantial evidence to support the court's finding that Hall is not mentally retarded, we affirm.

Hall v. State, 109 So. 3d 704, 705-707 (Fla. 2012).[3]

---

[3] Hall's reliance on the dissenting opinion to the Florida Supreme Court's affirmance of the denial of relief on *Atkins* grounds is inappropriate. That opinion does not represent the law or the facts as found by the Florida Supreme Court.

THE RELEVANT FACTS

The factual recitation set out at pages 3-5 of the petition is argumentative, incomplete and inaccurate.

The Facts of the Murders.

In its direct appeal decision affirming Hall's conviction, the Florida Supreme Court summarized the facts in the following way:

> Hall and Mack Ruffin were indicted for the murders of Karol Hurst and Deputy Sheriff Lonnie Coburn. Hall was tried alone for the Hurst murder, which is the subject of this appeal.[FN1]
>
> > [FN1] Ruffin, tried separately for the Hurst murder, was convicted and received a death sentence. This Court affirmed. Ruffin v. State, 397 So.2d 277 (Fla.1980). Tried together, Hall and Ruffin were convicted of murdering Deputy Coburn. Ruffin received a sentence of life imprisonment while Hall received another death sentence. Hall v. State, 403 So.2d 1319 (Fla.1980). Of course, our review of the present case is limited to the record presented in the instant case.
>
> On February 21, 1978, Mrs. Hurst, a 21-year-old housewife who was seven months pregnant, left a Pantry Pride checkout counter in Leesburg, Florida, at 3:00 p.m. Her body was found at 3:00 p.m. on February 22, 1978, in Sumter County. She had been shot and sexually assaulted. In custody on the morning of February 22 for Deputy Coburn's death, Hall told a deputy sheriff how, on the previous day, he and Ruffin had sat in that Pantry Pride parking lot looking for a car to use in committing a robbery when he, Hall, accosted Mrs. Hurst and forced her into her car. Hall slid in behind the steering wheel and drove while Ruffin followed in his own car. They stopped in a wooded area where, according to Hall, Ruffin beat, sexually assaulted, and shot Mrs. Hurst.

> At trial the evidence established that, after leaving the wooded area, the pair was seen at a convenience store in Hernando County. Their conduct in the store aroused suspicions and the clerk called the sheriff's office. Before a deputy arrived, Hall and Ruffin left the store. Shortly after their departure the clerk heard a shot and found Deputy Coburn dead on the ground behind the store. Coburn's weapon was missing, but under his body lay the weapon later shown to have killed Mrs. Hurst. Hall and Ruffin fled in the Hurst vehicle, which they had driven to the store, but, after a chase, they abandoned the car and fled on foot. Both men were caught shortly thereafter. They left Coburn's pistol, Mrs. Hurst's handbag, and groceries which she had bought that afternoon in the car.
>
> Hall contends that the state has failed to prove him guilty of first-degree murder. The state presented the case to the jury on the theory that Hall and Ruffin did everything together. They planned the robbery together and drove together to the Pantry Pride parking lot to obtain a car. Hall drove the Hurst car to the wooded area while Ruffin followed in his own car. The two were together at the site of Mrs. Hurst's assault and death, at the convenience store where their actions drew suspicions, and when they fled in the stolen car. These circumstances were sufficient to convince the jury that the criminal acts were the result of a common scheme.

Hall v. State, 403 So. 2d 1321, 1322-1323 (Fla. 1981).

On resentencing, the Florida Supreme Court affirmed the finding of the following seven (7) aggravating factors:

> In sentencing Hall to death the court found that seven aggravators had been established: 1) previous conviction of violent felony (assault with intent to commit rape, second-degree murder, shooting at or into an occupied vehicle); 2) under sentence of imprisonment (on parole for the assault conviction); 3) committed during the commission of kidnapping and sexual battery; 4) committed for pecuniary gain (stealing the victim's car); 5) heinous, atrocious, or

> cruel; 6) cold, calculated, and premeditated; and 7) committed to avoid or prevent arrest.

Hall v. State, 614 So. 2d 473, 477 (Fla. 1993). With respect to the offered mitigation, the Florida Supreme Court said:

> The judge considered four statutory mitigators and more than twenty items of nonstatutory mitigating evidence grouped into three general areas, *i.e.*, mental, emotional, and learning disabilities; abused and deprived childhood; and disparate treatment of co-perpetrator. Although the judge initially stated that some of the mitigating evidence was "unquantifiable," he later spent almost six pages analyzing the mitigating evidence and concluded that whatever mitigators had been established did not outweigh the aggravators.

Hall v. State, 614 So. 2d at 478.

REASONS FOR DENYING THE WRIT

THIS COURT SHOULD DECLINE TO EXERCISE ITS CERTIORARI JURISDICTION TO REVIEW FLORIDA'S DEFINITION AND APPLICATION OF THE INTELLIGENCE (IQ) PRONG OF THE THREE-PART DEFINITION OF MENTAL RETARDATION WHICH DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT; WAS DECIDED CORRECTLY ON ADEQUATE AND INDEPENDENT STATE LAW GROUNDS; AND THAT CANNOT BE RESOLVED WITHOUT EXTENSIVE FACTUAL DISCUSSION THAT HAS NO IMPACT ON ANY OTHER CASE.

There is more to being mentally retarded than scoring low on an intelligence test. *Atkins v. Virginia*, and the mental-retardation-as-a-bar-to-execution cases applying it, have recognized that basic fact. *Atkins* itself left the implementation of that constitutional requirement to the States,[4]

[4] Florida has done that (and in fact had already implemented that very rule prior to the release of *Atkins*), and there is no

and Florida, like the other states, implemented the three-part definition of mental retardation that was used by this Court in that decision. This Court did not undertake to prescribe any specific rules or procedures beyond the general constitutional rule found in the decision itself, but there is no argument possible that requiring a defendant to establish the three diagnostic criteria used in *Atkins* is in some way defective.

Hall says that Florida's definition of retardation conflicts with *Atkins* because it requires a score of 70 or below to establish the "significantly subaverage intellectual functioning" component of the three-part definition.[5] He does so based on the assertion that *Atkins* **requires** the states to adopt what Hall says is the "clinical definition" of retardation and to abdicate the State's legislative authority to implement

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constitutional infirmity with that procedure, which is not what Hall is challenging, anyway. Instead, Hall's petition challenges the determination *vel non* that he is not mentally retarded. That is a wholly factual issue that is wholly specific to this case.

[5] Florida is far from the only state to establish such a cut-of score:

> Indeed, another jurisdiction considering a similar claim noted that fourteen of the twenty-six jurisdictions with mental retardation statutes have a cutoff of seventy or two standard deviations below the mean. *Bowling v. Commonwealth*, 163 S.W.3d 361, 373-74(Ky.) (upholding use of seventy IQ score cutoff), *cert. denied*, 546 U.S. 1017, 126 S.Ct. 652, 163 L.Ed.2d 528 (2005).

Cherry v. State, 959 So. 2d 702, 713-714 n. 8 (Fla. 2007).

Atkins to the developers of the Weschler intelligence test. No decision from this Court says that, and *Atkins* itself expressly left the task of defining retardation to the States. *Atkins*, 536 U.S. at 317. In fact, this Court expressly recognized that the definitions that had been adopted by various State statutes were not identical to the clinical definitions that this Court had mentioned in the opinion immediately after delegating the task of defining retardation to the states. *Id.* at 317 n.22. Thus, this Court clearly recognized that the clinical definitions had not been adopted by the states in the manner Petitioner suggests they must be under *Atkins*. Additionally, this Court itself has left no doubt that it left the the procedural and substantive task of defining retardation to the States. *Bobby v. Bies*, 129 S. Ct. 2145, 2150 (2009).[6] Given these circumstances, Petitioner's assertion that Florida's definition of retardation conflicts with *Atkins* is meritless. Certiorari should be denied.

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[6] This Court was explicit:

> Our opinion did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation "will be so impaired as to fall [within *Atkins*' compass]." We "le[ft] to the States the task of developing appropriate ways to enforce the constitutional restriction." *Id.*, at 317, 122 S.Ct. 2242 (internal quotation marks omitted).

Bobby v. Bies, 556 U.S. 825, 831, 129 S.Ct. 2145, 2150 (2009).

The Florida Supreme Court affirmed the trial court's denial of relief on independently adequate state law grounds, which were decided correctly. The Court said:

> Hall asserts that he is mentally retarded pursuant to *Atkins*. Further, Hall alleges that his IQ should be read as a range of scores from 67 to 75 and that this Court's adoption of a firm cutoff of 70 or below to qualify as mentally retarded misapplies the Supreme Court's ruling in *Atkins* and fails to reflect an understanding of IQ testing. Hall contends that the appropriate standard would (a) include the standard error measurement (SEM), and (b) provide for a score band or range of scores. We recently declined to adopt this "range of scores" argument. *See Franqui v. State*, 59 So. 3d 82 (Fla. 2011). We again decline to adopt this line of reasoning. As we stated in *Franqui*:
>
> > Nixon asserted, as does Franqui, that the Supreme Court in *Atkins* noted a consensus in the scientific community that a full scale IQ falling within a range of 70 to 75 meets the first prong of the test for mental retardation; therefore, Nixon contended, states must recognize the higher cut-off IQ score of 75. *Nixon*, 2 So. 3d at 142. We disagreed, reasoning that *Atkins* recognized a difference of opinion among various sources as to who should be classified as mentally retarded, and consequently left to the states the task of developing appropriate ways to enforce the constitutional restriction on imposition of the death sentence on mentally retarded persons. *Nixon*, 2 So. 3d at 142.
>
> *Id.* at 94 (*citing Nixon v. State*, 2 So. 3d 137 (Fla. 2009)).
>
> Section 921.137, *Florida Statutes* (2012), prohibits the trial court from sentencing to death a mentally retarded defendant who is convicted of a capital felony. Section 921.137 provides the governing legal standard for such claims, and rule 3.203 outlines the procedural requirements. Both the statute and rule

define the elements of a mental retardation claim as discussed in *Atkins*: (1) significantly subaverage general intellectual functioning, (2) existing concurrently with deficits in adaptive behavior, and (3) manifested during the period from conception to age eighteen. *See Atkins*, 536 U.S. at 318, 122 S.Ct. 2242; § 921.137(1), *Fla. Stat.* (2012); *Fla. R. Crim. P.* 3.203(b). Subsection (1) of the statute defines mental retardation as:

> significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities. The term "adaptive behavior," for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community. The Agency for Persons with Disabilities shall adopt rules to specify the standardized intelligence tests as provided in this subsection.

§ 921.137(1), *Fla. Stat.* (2012). This statute was adopted prior to the Supreme Court's ruling in *Atkins*. *See* Ch.2001-202, § 1, *Laws of Fla.*

In *Cherry v. State*, 959 So. 2d 702 (Fla. 2007), we determined the proper interpretation of section 921.137. Cherry argued that an IQ measurement is more appropriately expressed as a range of scores rather than a concrete number because of the SEM. We held:

> Both section 921.137 and rule 3.203 provide that significantly subaverage general intellectual functioning means "performance that is two or more standard deviations from

> the mean score on a standardized intelligence test." One standard deviation on the WAIS-III, the IQ test administered in the instant case, is fifteen points, so two standard deviations away from the mean of 100 is an IQ score of 70.... [T]he statute does not use the word approximate, nor does it reference the SEM. Thus, the language of the statute and the corresponding rule are clear. We defer to the plain meaning of statutes....

Cherry, 959 So. 2d at 712-13.[7]

In *Nixon*, the appellant challenged our decision in Cherry, also alleging that we improperly imposed a firm IQ cutoff of 70. We disagreed, reasoning that while *Atkins* recognized a difference of opinion among various sources regarding who should be classified as mentally retarded, the Supreme Court left the determination to the individual states. Accordingly, we found that Florida's definition is consistent with the American Psychiatric Association's diagnostic criteria for mental retardation. *Nixon v. Florida*, 2 So. 3d 137, 143 (Fla. 2009) (*citing Jones v. State*, 966 So. 2d 319, 326 (Fla. 2007)).

The cutoff was recently reaffirmed in *Franqui*. Franqui was convicted of the December 1991 murder of Raul Lopez and sentenced to death, which this Court affirmed. *Franqui v. State*, 59 So. 3d 82, 106 (Fla. 2011) (*citing Franqui v. State*, 699 So. 2d 1312 (Fla. 1997)). Franqui filed his initial rule 3.850 motion in January 1999, which he then amended in April 2000. *Id.* at 89. Prior to the evidentiary hearing granted on some of the claims he raised, Franqui supplemented his motion to raise an *Atkins* claim, which was summarily denied on February 21, 2008. *Id.* at 89-90. On review, we temporarily relinquished jurisdiction to the circuit court with directions to hold an evidentiary hearing on the mental retardation claim. *Id.* at 90 (*citing Franqui v. State*, 14 So. 3d 238 (Fla. 2009)).

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[7] The petition for certiorari filed by Cherry was denied. *Cherry v. Florida*, 552 U.S. 993, 128 S.Ct. 490, 169 L.Ed.2d 344 (2007). Nixon and Franqui apparently did not file a petition for writ of certiorari.

Testing revealed Franqui's IQ fell somewhere between 71 and 80. *Id.* at 91. The trial court, after considering the stipulated evidence of the experts' reports, found that Franqui was not mentally retarded as a matter of law. *Id.*

On appeal, Franqui raised essentially the same claim Hall raises here, namely: this Court's interpretation of mental retardation mandating a cutoff score of 70 or below to meet the first prong of the test for mental retardation is contrary to *Atkins*. In *Franqui*, we found that (1) the United States Supreme Court did not mandate a specific IQ score or range for a finding of mental retardation in *Atkins*; (2) Florida's statute prohibiting the execution of the mentally retarded, section 921.137, preceded *Atkins*; (3) proper interpretation of section 921.137 was under the plain language of the statute providing that "significantly subaverage general intellectual functioning" means performance that is "two or more standard deviations from the mean score on a standardized intelligence test" and does not require the Court to consider the standard error of measurement (SEM); and (4) one standard deviation on the test in question is fifteen points, thus 70 is the appropriate score based on the plain language of section 921.137 and not a range of scores.

Hall argues that we recognized a higher IQ as possible evidence of mental retardation in *Thompson v. State*, 3 So. 3d 1237 (Fla. 2009), where we reversed the trial court's summary denial of Thompson's postconviction motion. Although Thompson's motion alleged an IQ of 74 or 75, [FN2] we reversed the trial court's summary denial and remanded for the court to hold an evidentiary hearing to determine whether Thompson met the requirements established in *Cherry*. *Thompson*, 3 So. 3d at 1238-39. However, we specified, "[W]e express no opinion on the merits of [Thompson's] claim of mental retardation." *Thompson*, 3 So.3d at 1238.

> [FN2] *Thompson*, 3 So.3d at 1239 (Wells, J., dissenting).

Hall additionally alleges that this Court recognized an IQ score of 75 as "evidence of mental retardation" in *Foster v. State*, 929 So. 2d 524 (Fla. 2006). Hall

> mischaracterizes our opinion. We quoted the postconviction court, which found that " 'even if the Defendant's IQ score of 75 is considered as evidence of mental retardation, [he] does not meet the second prong of the test set forth in *Atkins*....' " *Id.* at 532. As such, neither this Court nor the lower court recognized 75 as evidence of mental retardation.
>
> Like Franqui before him, Hall asserts that the statutorily prescribed cutoff is arbitrary because it does not consider the range of scores mentioned in *Atkins*. We have previously found this argument to be meritless. *See, e.g.*, *Cherry*, 959 So. 2d at 712-13; *Nixon*, 2 So. 3d at 142; *Phillips v. State*, 984 So. 2d 503, 510 (Fla. 2008); *Jones v. State*, 966 So. 2d 319, 329 (Fla. 2007); *Brown v. State*, 959 So. 2d 146, 148-49 (Fla. 2007); *Burns v. State*, 944 So. 2d 234, 248 (Fla. 2006); *Rodgers v. State*, 948 So. 2d 655, 666-68 (Fla. 2006); *Trotter v. State*, 932 So. 2d 1045, 1049-50 (Fla. 2006); *Johnston v. State*, 960 So. 2d 757, 761 (Fla. 2006); *Zack v. State*, 911 So. 2d 1190, 1201 (Fla. 2005).[8]

Hall v. State, 109 So. 3d 704, 707-710 (Fla. 2012).

That disposition is based on the findings of the Florida trial court which, in its turn, had made extensive, and specific, findings of fact from the evidence presented at the evidentiary hearing. Among those factual findings, and dispositive of Hall's claims from an evidentiary standpoint, is

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[8] This Court denied Rodgers' petition for certiorari. *Rodgers v. Florida*, 552 U.S. 833, 128 S.Ct. 59, 169 L.Ed.2d 50 (2007). The other inmates (except for Cherry) did not seek review in this Court.

that Hall has scored as high as 80 on a version of the Wechsler intelligence test.[9] That order is attached hereto as Appendix B.

The Florida Supreme Court's affirmance of the denial of relief is the quintessential evidentiary ruling that is wholly inappropriate for certiorari review. Lest there be any doubt as to how far from appropriate for certiorari consideration the claim is, Hall's petition is filled with citations to the trial court record as if this proceeding was a direct appeal, and the entire transcript of the State Court evidentiary hearing is attached as an appendix to the petition. Hall would have this Court utilize its discretionary jurisdiction to review the **evidence** underlying the denial of his claim for relief under *Atkins*. This Court's precedent is well-settled that a writ of certiorari is not issued to review evidence and find facts. *United States v. Johnston*, 278 U.S. 220, 227 (1925); *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955). That such an intensive factual review is what Hall wants is made clear by the attachment of the transcript from the State Court hearing. Review of trial evidence for the purpose of second-guessing the Florida trial and appellate courts is not the purpose of certiorari review. And, because the issue Hall seeks to present is wholly dependent on intelligence testing procedures and

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[9] Hall's petition includes a substantial discussion of the Wechsler series of intelligence tests. There is no claim that those test instruments are not appropriate.

results, the issue is so highly fact specific that it is of no significance beyond the boundaries of this case. Because the fact-specific issue contained in the petition is of extremely limited significance, it is unworthy of this Court's attention. *Rice*, 349 U.S. at 79.

The problem with Hall's claim, as the Florida Supreme Court held, is that the evidence does not support it:

> At the evidentiary hearing held on December 7 and 8, 2009, Hall presented testimony from Dr. Valerie McClain, who testified that she did not obtain Hall's IQ; Lugene Ellis, Hall's half-brother, who testified about his recollection of Hall as a child; James Hall, Hall's brother, who testified regarding Hall's problems with reading, writing, and caring for himself; Dr. Harry Krop, who testified that Hall's IQ using the Wechsler Adult Intelligence Scale Revises was 73 and that a prior result on the same test given by Marilyn Feldman resulted in a score of 80; and Dr. Gregory Prichard, who testified that Hall scored a 71 on the Wechsler Adult Intelligence Scale Third Edition (WAIS-III). Hall sought to introduce a report compiled by then-deceased Dr. Bill Mosman through Dr. Prichard, but the court denied it and only allowed Hall to proffer the report for the record. **After reviewing the evidence presented, the court determined that Hall could not meet the first prong of the mental retardation standard to establish his mental retardation -- an IQ below 70.** The court denied relief in an order issued May 26, 2010, and entered an amended order on June 16, 2010.

Hall v. State, 109 So. 3d at 707. (emphasis added). Not only did the Florida Supreme Court hold that Hall has not produced an IQ score falling in the range of mental retardation, the true facts are that Hall has scored as high as 80 on intelligence testing,

and such a score is well outside any possible diagnosis of mental retardation.

This Court has long recognized that its jurisdiction does not lie to review decisions from state courts that rest on adequate and independent state law grounds, which this most certainly is. *Sochor v. Florida*, 504 U.S. 527, 533 (1992); *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945) ("This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds."). This lack of jurisdiction occurs when the state court decision contains a plain statement that the decision relies on a state law basis even if the state court alternatively reached the merits. *Sochor*, 504 U.S. at 533; *see Michigan v. Long*, 463 U.S. 1032, 1041 (1983); *see also Harris v. Reed*, 489 U.S. 255, 264, n.10 (1989); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). Florida's implementation of *Atkins* is a matter of State law. Certiorari should be denied.

Finally, Hall's petition does not involve an unsettled, important federal question -- a federal question with ramifications beyond the case presented -- nor is there conflict with a relevant decision by this Court. Cases that do not present such a decisional split or unresolved federal question do not merit certiorari review. *Rockford Life Ins. Co. v. Illinois Dep't of Revenue*, 482 U.S. 182, 184 n.3 (1987). *See*

also Bartlett v. Stephenson, 535 U.S. 1301, 1304 (2002) (issues with few, if any, ramifications beyond the presenting case do not satisfy any of the criteria for exercise of certiorari jurisdiction). If a case presents no federal question, certiorari review is inappropriate. *See Eddings v. Oklahoma*, 455 U.S. 104, 117 (1982); *Zucht v. King*, 260 U.S. 174 (1922). Because the Petitioner's claim is, at best, a claim that the Florida Supreme Court erred in affirming the trial court's findings of fact, it cannot satisfy this Court's requirements under Rule 10. U.S. Sup. Ct. R. 10.

CONCLUSION

Hall's petition is no more than his request for this Court to interpret Florida law in a manner helpful to him. Hall's claim, when stripped of its pretensions, is that this Court should alter its *Atkins* holding to disallow the States from requiring that an intelligence score must fall below a specified level in order to establish the "subaverage intelligence" component of the three-part definition of mental retardation. That claim does not have a constitutional dimension. While the petition contains histrionic assertions that Florida has "significantly altered" the "clinical definition of mental retardation" of mental retardation, the true facts show nothing more than Florida's wholly proper implementation of this Court's decision in *Atkins*, which allowed the states to do exactly as

Florida has done. In a very real sense, Hall would have this Court abdicate the implementation of *Atkins* to the "creators of the standardized IQ tests." *Petition*, at 13. That is inappropriate, and demonstrates the inappropriateness of certiorari in this case. Based upon the foregoing, the Respondent submits that the petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by e-mail to: Eric Pinkard, pinkard@ccmr.state.fl.us, support@ccmr.state.fl.us on this 18 day of July, 2013.

KENNETH S. NUNNELLEY
SENIOR ASSISTANT ATTORNEY GENERAL

APPENDIX A

109 So.3d 704, 37 Fla. L. Weekly S773
(Cite as: 109 So.3d 704)

Supreme Court of Florida.
Freddie Lee HALL, Appellant,
v.
STATE of Florida, Appellee.

No. SC10–1335.
Dec. 20, 2012.
Rehearing Denied March 8, 2013.

Background: Following affirmance of murder conviction, 403 So.2d 1321, death sentence, 614 So.2d 473, and denial of postconviction relief, 742 So.2d 225, defendant filed successive motion to vacate sentence. The Circuit Court, Sumter County, Richard Tombrink, Jr., J., denied motion and defendant appealed.

Holdings: The Supreme Court held that:
(1) cutoff intelligence-quotient (IQ) score of 70 or below to meet the test for mental retardation, as would preclude death penalty, is not improperly arbitrary;
(2) a defendant must establish all three elements to show that he or she is mentally retarded and thus ineligible for execution;
(3) defendant was not entitled to admission of report regarding his IQ score for which underlying data was unavailable; and
(4) trial court's finding that defendant was mentally retarded as mitigation did not estop relitigation of the issue of retardation under *Atkins v. Virginia*.

Affirmed.

Pariente, J., concurred and filed opinion.

Labarga, J., dissented and filed opinion, in which Perry, J., concurred.

Perry, J., dissented and filed opinion, in which Labarga, J., concurred.

West Headnotes

[1] Sentencing and Punishment 350H ⇨1642

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(B) Persons Eligible
350Hk1642 k. Mentally retarded persons. Most Cited Cases

Cutoff intelligence-quotient (IQ) score of 70 or below to meet the test for mental retardation, as would preclude death penalty, is not improperly arbitrary. U.S.C.A. Const.Amend. 8; West's F.S.A. § 921.137; West's F.S.A. RCrP Rule 3.203.

[2] Sentencing and Punishment 350H ⇨1642

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(B) Persons Eligible
350Hk1642 k. Mentally retarded persons. Most Cited Cases

To show that he or she is mentally retarded and thus ineligible for execution, the defendant must establish that he has significantly subaverage general intellectual functioning, that this significantly subaverage general intellectual functioning exists with deficits in adaptive behavior, and that the significantly subaverage general intellectual functioning and deficits in adaptive behavior manifested before the age of eighteen. U.S.C.A. Const.Amend. 8.

[3] Sentencing and Punishment 350H ⇨1642

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(B) Persons Eligible
350Hk1642 k. Mentally retarded persons. Most Cited Cases

Because a defendant challenging death penalty on grounds of mental retardation must establish all three elements to show that he or she is mentally re-

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tarded and thus ineligible for execution, the failure to establish any one element will end the inquiry. U.S.C.A. Const.Amend. 8.

[4] Sentencing and Punishment 350H ⇐1793

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)5 Mental Illness or Disorder
350Hk1793 k. Evidence. Most Cited Cases

Defendant challenging death penalty on grounds of mental retardation in motion to vacate sentence was not entitled to admission of report finding defendant to have an intelligence quotient (IQ) of 69; underlying data to support the report were not available such that the State could not conduct a proper voir dire, and defendant could not otherwise establish the adequacy of the underlying data to support the report.

[5] Criminal Law 110 ⇐1433(1)

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(A) In General
110k1433 Matters Already Adjudicated
110k1433(1) k. In general. Most Cited Cases

Trial court's finding that defendant was mentally retarded as mitigation in death penalty case did not estop relitigation of the issue of mental retardation upon defendant's postconviction challenge to death penalty on grounds of mental retardation under the United States Supreme Court's intervening decision in *Atkins v. Virginia*; mental retardation as a mitigator and mental retardation under *Atkins* were discrete legal issues, and change in law substantially altered the State's incentive to contest defendant's mental capacity.

*705 Bill Jennings, Capital Collateral Regional Counsel, Raheela Ahmed and Carol C. Rodriguez, Assistant Capital Collateral Region Counsel, Middle Region, Tampa, Florida and Eric Calvin Pinkard of Anderson Pinkard, P.A., Clearwater, Florida, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, Florida and Kenneth Sloan Nunnelley, Assistant Attorney General, Daytona Beach, Florida, for Appellee.

PER CURIAM.

This case is before the Court on appeal of an order denying a motion to vacate a sentence of death under Florida Rule of Criminal Procedure 3.203. Because the order concerns postconviction relief from a sentence of death, this Court has jurisdiction of the appeal under article V, section 3(b)(1), Florida Constitution. For the reasons expressed herein, we affirm the order denying relief.

FACTS AND PROCEDURAL HISTORY

Freddie Lee Hall was tried and convicted in Putnam County for the 1978 murder *706 of Karol Hurst. *Hall v. State (Hall I)*, 403 So.2d 1321, 1323 (Fla.1981). We upheld Hall's conviction and sentence on direct appeal. *Id.* at 1325.

On September 9, 1982, the governor signed Hall's first death warrant, effective for the week of October 1 through 8, 1982. *Hall v. State (Hall II)*, 420 So.2d 872, 873 (Fla.1982). Hall filed a motion to vacate, a petition for writ of habeas corpus, and an application for a stay of execution, all of which were denied. *Id.* Hall then sought habeas corpus relief in the federal court, which was denied without an evidentiary hearing. *Hall v. Wainwright (Hall III)*, 733 F.2d 766, 769 (11th Cir.1984), *cert. denied*, 471 U.S. 1107, 105 S.Ct. 2344, 85 L.Ed.2d 858 (1985). Hall appealed to the Eleventh Circuit Court of Appeals, which reversed in part and remanded for a hearing. *Id.* at 777 (finding that Hall was entitled to a hearing on the issues of his absence from the courtroom and whether he deliberately bypassed his ineffective assistance of counsel claim).

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On remand, the district court again denied relief, finding that Hall's absences from trial occurred during non-critical stages and were therefore harmless, and that he deliberately bypassed the ineffective assistance of counsel claim. *Hall v. Wainwright (Hall IV)*, 805 F.2d 945, 946 (11th Cir.1986), *cert. denied, Hall v. Dugger*, 484 U.S. 905, 108 S.Ct. 248, 98 L.Ed.2d 206 (1987). The Eleventh Circuit affirmed the denial. *Id.* at 948. Hall then petitioned this Court for habeas corpus relief based on the United States Supreme Court's ruling in *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) (holding that all mitigating factors, not just statutory mitigation, should be considered by the judge and jury). This Court held that any error in the sentencing was harmless. *Hall v. Dugger (Hall V)*, 531 So.2d 76, 77 (Fla.1988).

The governor then signed a second death warrant on September 20, 1988. *Hall v. State (Hall VI)*, 541 So.2d 1125, 1126 (Fla.1989). Hall filed his second 3.850 motion, alleging error under *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). The trial court found that this Court's ruling on the issue in *Hall V* was a procedural bar to Hall raising the claim again. *Hall VI*, 541 So.2d at 1126. We disagreed, stating that the "case involves significant additional non-record facts" that had not been considered on habeas review. *Id.* Ultimately, we determined that a *Hitchcock* error occurred, and that such error could not be considered harmless. *Id.* at 1128. We then vacated Hall's death sentence and remanded for a new sentencing proceeding. *Id.*

During the resentencing, the trial court found Hall mentally retarded as a mitigating factor and gave it "unquantifiable" weight. The court again condemned Hall to death, and we affirmed. *Hall v. State (Hall VII)*, 614 So.2d 473, 479 (Fla.1993). Hall sought postconviction relief, which was denied. *Hall v. State (Hall VIII)*, 742 So.2d 225, 230 (Fla.1999). We affirmed the denial. *Id.* at 230. In finding that the trial court properly denied Hall's claim that the court erred in finding him competent to proceed at the resentencing, we stated "While there is no doubt that [Hall] has serious mental difficulties, is probably somewhat retarded, and certainly has learning difficulties and a speech impediment, the Court finds that [Hall] was competent at the resentencing hearings." *Id.* at 229.

After *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), was decided, Hall filed a motion to declare *707 section 921.137, Florida Statutes (2004),[FN1] unconstitutional. While the motion was pending, we adopted Florida Rule of Criminal Procedure 3.203 as a mechanism to file *Atkins* claims. Hall timely filed such a claim on November 30, 2004. No action was taken on the motion until, on March 27, 2008, Hall filed a motion to prohibit relitigation of the mental retardation issue, which was denied. The court then held an evidentiary hearing on Hall's successive motion to vacate his sentence.

> FN1. Section 921.137, Florida Statutes was enacted during a regular session of the Florida Legislature in 2001. *See* ch.2001–202, § 1, Laws of Fla. The statute has been amended once to transfer duties from the Developmental Disabilities Program Office within the Department of Children and Family Services to the Agency for Persons with Disabilities. *See* ch.2006–195, § 23, Laws of Fla.

At the evidentiary hearing held on December 7 and 8, 2009, Hall presented testimony from Dr. Valerie McClain, who testified that she did not obtain Hall's IQ; Eugene Ellis, Hall's half-brother, who testified about his recollection of Hall as a child; James Hall, Hall's brother, who testified regarding Hall's problems with reading, writing, and caring for himself; Dr. Harry Krop, who testified that Hall's IQ using the Wechsler Adult Intelligence Scale Revises was 73 and that a prior result on the same test given by Marilyn Feldman resulted in a score of 80; and Dr. Gregory Prichard, who testified that Hall scored a 71 on the Wechsler Adult Intelligence Scale Third Edition (WAIS–III). Hall

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sought to introduce a report compiled by then-deceased Dr. Bill Mosman through Dr. Prichard, but the court denied it and only allowed Hall to proffer the report for the record. After reviewing the evidence presented, the court determined that Hall could not meet the first prong of the mental retardation standard to establish his mental retardation—an IQ below 70. The court denied relief in an order issued May 26, 2010, and entered an amended order on June 16, 2010.

Hall appeals the court's denial, raising four claims: (1) the trial court's finding that Hall is not mentally retarded is not supported by competent, substantial evidence; (2) the trial court erred in granting the State's motion in limine that limited the evidence Hall could present on his mental retardation claim; (3) the trial court erred by striking Dr. Mosman's report; and (4) the trial court should have imposed a life sentence based on the doctrine of collateral estoppel. Because we find that there is competent, substantial evidence to support the court's finding that Hall is not mentally retarded, we affirm.

DISCUSSION

Hall asserts that he is mentally retarded pursuant to *Atkins*. Further, Hall alleges that his IQ should be read as a range of scores from 67 to 75 and that this Court's adoption of a firm cutoff of 70 or below to qualify as mentally retarded misapplies the Supreme Court's ruling in *Atkins* and fails to reflect an understanding of IQ testing. Hall contends that the appropriate standard would (a) include the standard error measurement (SEM), and (b) provide for a score band or range of scores. We recently declined to adopt this "range of scores" argument. *See Franqui v. State*, 59 So.3d 82 (Fla.2011). We again decline to adopt this line of reasoning. As we stated in *Franqui*:

> Nixon asserted, as does Franqui, that the Supreme Court in *Atkins* noted a consensus in the scientific community that a full scale IQ falling within a range of 70 to 75 meets the first prong of the test for mental retardation; therefore, Nixon contended, states must recognize *708 the higher cut-off IQ score of 75. *Nixon*, 2 So.3d at 142. We disagreed, reasoning that *Atkins* recognized a difference of opinion among various sources as to who should be classified as mentally retarded, and consequently left to the states the task of developing appropriate ways to enforce the constitutional restriction on imposition of the death sentence on mentally retarded persons. *Nixon*, 2 So.3d at 142.

Id. at 94 (citing *Nixon v. State*, 2 So.3d 137 (Fla.2009)).

Section 921.137, Florida Statutes (2012), prohibits the trial court from sentencing to death a mentally retarded defendant who is convicted of a capital felony. Section 921.137 provides the governing legal standard for such claims, and rule 3.203 outlines the procedural requirements. Both the statute and rule define the elements of a mental retardation claim as discussed in *Atkins:* (1) significantly subaverage general intellectual functioning, (2) existing concurrently with deficits in adaptive behavior, and (3) manifested during the period from conception to age eighteen. *See Atkins*, 536 U.S. at 318, 122 S.Ct. 2242; § 921.137(1), Fla. Stat. (2012); Fla. R.Crim. P. 3.203(b). Subsection (1) of the statute defines mental retardation as:

> significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities. The term "adaptive behavior," for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community. The Agency for Persons with Disabilities

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> shall adopt rules to specify the standardized intelligence tests as provided in this subsection.

§ 921.137(1), Fla. Stat. (2012). This statute was adopted prior to the Supreme Court's ruling in *Atkins*. *See* Ch.2001–202, § 1, Laws of Fla.

In *Cherry v. State*, 959 So.2d 702 (2007), we determined the proper interpretation of section 921.137. Cherry argued that an IQ measurement is more appropriately expressed as a range of scores rather than a concrete number because of the SEM. We held:

> Both section 921.137 and rule 3.203 provide that significantly subaverage general intellectual functioning means "performance that is two or more standard deviations from the mean score on a standardized intelligence test." One standard deviation on the WAIS–III, the IQ test administered in the instant case, is fifteen points, so two standard deviations away from the mean of 100 is an IQ score of 70.... [T]he statute does not use the word approximate, nor does it reference the SEM. Thus, the language of the statute and the corresponding rule are clear. We defer to the plain meaning of statutes....

Cherry, 959 So.2d at 712–13.

In *Nixon*, the appellant challenged our decision in *Cherry*, also alleging that we improperly imposed a firm IQ cutoff of 70. We disagreed, reasoning that while *Atkins* recognized a difference of opinion among various sources regarding who should be classified as mentally retarded, the Supreme Court left the determination to the individual states. Accordingly, we found that Florida's definition is consistent with the American Psychiatric Association's diagnostic*709 criteria for mental retardation. *Nixon v. Florida*, 2 So.3d 137, 143 (Fla.2009) (citing *Jones v. State*, 966 So.2d 319, 326 (Fla.2007)).

The cutoff was recently reaffirmed in *Franqui*. Franqui was convicted of the December 1991 murder of Raul Lopez and sentenced to death, which this Court affirmed. *Franqui v. State*, 59 So.3d 82, 106 (Fla.2011) (citing *Franqui v. State*, 699 So.2d 1312 (Fla.1997)). Franqui filed his initial rule 3.850 motion in January 1999, which he then amended in April 2000. *Id.* at 89. Prior to the evidentiary hearing granted on some of the claims he raised, Franqui supplemented his motion to raise an *Atkins* claim, which was summarily denied on February 21, 2008. *Id.* at 89–90. On review, we temporarily relinquished jurisdiction to the circuit court with directions to hold an evidentiary hearing on the mental retardation claim. *Id.* at 90 (citing *Franqui v. State*, 14 So.3d 238 (Fla.2009)). Testing revealed Franqui's IQ fell somewhere between 71 and 80. *Id.* at 91. The trial court, after considering the stipulated evidence of the experts' reports, found that Franqui was not mentally retarded as a matter of law. *Id.*

[1] On appeal, Franqui raised essentially the same claim Hall raises here, namely: this Court's interpretation of mental retardation mandating a cutoff score of 70 or below to meet the first prong of the test for mental retardation is contrary to *Atkins*. In *Franqui*, we found that (1) the United States Supreme Court did not mandate a specific IQ score or range for a finding of mental retardation in *Atkins;* (2) Florida's statute prohibiting the execution of the mentally retarded, section 921.137, preceded *Atkins;* (3) proper interpretation of section 921.137 was under the plain language of the statute providing that "significantly subaverage general intellectual functioning" means performance that is "two or more standard deviations from the mean score on a standardized intelligence test" and does not require the Court to consider the standard error of measurement (SEM); and (4) one standard deviation on the test in question is fifteen points, thus 70 is the appropriate score based on the plain language of section 921.137 and not a range of scores.

Hall argues that we recognized a higher IQ as possible evidence of mental retardation in *Thompson v. State*, 3 So.3d 1237 (Fla.2009), where

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we reversed the trial court's summary denial of Thompson's postconviction motion. Although Thompson's motion alleged an IQ of 74 or 75,[FN2] we reversed the trial court's summary denial and remanded for the court to hold an evidentiary hearing to determine whether Thompson met the requirements established in *Cherry*. *Thompson*, 3 So.3d at 1238–39. However, we specified, "[W]e express no opinion on the merits of [Thompson's] claim of mental retardation." *Thompson*, 3 So.3d at 1238.

FN2. *Thompson*, 3 So.3d at 1239 (Wells, J., dissenting).

Hall additionally alleges that this Court recognized an IQ score of 75 as "evidence of mental retardation" in *Foster v. State*, 929 So.2d 524 (Fla.2006). Hall mischaracterizes our opinion. We quoted the postconviction court, which found that " 'even if the Defendant's IQ score of 75 is considered as evidence of mental retardation, [he] does not meet the second prong of the test set forth in *Atkins*....' " *Id.* at 532. As such, neither this Court nor the lower court recognized 75 as evidence of mental retardation.

Like Franqui before him, Hall asserts that the statutorily prescribed cutoff is arbitrary because it does not consider the range of scores mentioned in *Atkins*. We *710 have previously found this argument to be meritless. *See, e.g.*, *Cherry*, 959 So.2d at 712–13; *Nixon*, 2 So.3d at 142; *Phillips v. State*, 984 So.2d 503, 510 (Fla.2008); *Jones v. State*, 966 So.2d 319, 329 (Fla.2007); *Brown v. State*, 959 So.2d 146, 148–49 (Fla.2007); *Burns v. State*, 944 So.2d 234, 248 (Fla.2006); *Rodgers v. State*, 948 So.2d 655, 666–68 (Fla.2006); *Trotter v. State*, 932 So.2d 1045, 1049–50 (Fla.2006); *Johnston v. State*, 960 So.2d 757, 761 (Fla.2006); *Zack v. State*, 911 So.2d 1190, 1201 (Fla.2005).

[2][3] Hall next contends that the lower court improperly limited his introduction of evidence of the second two elements to establish mental retardation. We have recognized that all three elements must be established for a defendant to show that he or she is mentally retarded and thus ineligible for execution.

> The defendant must establish that he has significantly subaverage general intellectual functioning. If significantly subaverage general intellectual functioning is established, the defendant must also establish that this significantly subaverage general intellectual functioning exists with deficits in adaptive behavior. Finally, he must establish that the significantly subaverage general intellectual functioning and deficits in adaptive behavior manifested before the age of eighteen.

Thompson, 3 So.3d at 1238 (quoting *Cherry*, 959 So.2d at 711) (internal brackets omitted). Thus, we have concluded that because a defendant must establish all three elements of such a claim, the failure to establish any one element will end the inquiry. *See, e.g.*, *Cherry*, 959 So.2d at 714 ("Because we find that [the defendant] does not meet this first prong of the section 921.137(1) criteria, we do not consider the other two prongs of the mental retardation determination."). Hall's argument that the lower court improperly limited his introduction of evidence after he failed to establish the requisite IQ is thus without merit. *See Jones v. State*, 966 So.2d 319, 325 (Fla.2007); *Burns v. State*, 944 So.2d 234, 249 (Fla.2006); § 921.137(4), Fla. Stat. (2012).

[4] Third, Hall complains that the trial court abused its discretion in refusing to admit the report prepared by Dr. Mosman through the testimony of Dr. Prichard. In its order, the court noted that Dr. Mosman's report "lacked critical detail and information indicating how he obtained [Hall's] intelligence quotient of sixty-nine (69)." The court determined that the report did not constitute competent evidence and that Hall's failure to comply with the court's order to compel was highly prejudicial to the State and excluded the report from evidence. Because the underlying data to support the report were not available, the State could not conduct a proper voir dire and Hall could not otherwise establish the adequacy of the underlying data to support

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Dr. Mosman's report. Accordingly, we find that the trial court did not abuse its discretion in excluding the report.

[5] Finally, Hall alleges that the lower court should have been precluded from holding an evidentiary hearing on Hall's alleged mental retardation and should have entered a life sentence because the court previously found him to be mentally retarded. We disagree.

In *Bobby v. Bies*, 556 U.S. 825, 129 S.Ct. 2145, 173 L.Ed.2d 1173 (2009), the United States Supreme Court addressed a similar issue. Michael Bies was tried and convicted in Ohio of the aggravated murder, kidnapping, and attempted rape of a ten-year-old boy nearly one decade prior to the Court's decision in *Atkins*. *Bies*, 129 S.Ct. at 2149. Bies' IQ fell in the 65 to 75 *711 range, indicating that he is "mildly mentally retarded to borderline mentally retarded." *Id.* at 2149–50. On postconviction review, the trial court agreed that Bies was mildly mentally retarded, but concluded that he was still eligible for execution. *Id.* at 2150. After the Supreme Court issued *Atkins*, and the Ohio Supreme Court adopted it in *State v. Lott*, 97 Ohio St.3d 303, 779 N.E.2d 1011 (2002), Bies presented his *Atkins* claim to the state's postconviction court. FN3 *Id.* Bies moved for summary judgment, arguing that the record established his mental retardation and that the State was precluded and estopped from disputing it. *Id.* The court denied summary judgment because Bies' mental retardation had not been established under the *Atkins-Lott* framework, and ordered a full hearing. *Id.* at 2151. Bies took his claim to the Federal District Court, arguing that the Fifth Amendment's Double Jeopardy Clause barred the State from relitigating the issue of his mental condition. The court agreed and ordered vacation of Bies' death sentence. The Court of Appeals affirmed. *Id.* The Supreme Court reversed, stating that "[t]he State did not 'twice put Bies in jeopardy.' " *Id.* Further, the court stated that no state-court determination of his mental retardation entitled him to a life sentence. *Id.* at 2152.

FN3. Unlike Florida, Ohio reviews mental retardation where the defendant's IQ is above 70 as a rebuttable presumption.

Here, Hall argues that the issue should be estopped because of the trial court's finding that Hall was mentally retarded as mitigation. As summarized by the Supreme Court in *Bies*,

> even if the core requirements for issue preclusion had been met, an exception to the doctrine's application would be warranted due to this Court's intervening decision in *Atkins*. Mental retardation as a mitigator and mental retardation under *Atkins* ... are discrete legal issues. The *Atkins* decision itself highlights one difference: "[R]eliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." 536 U.S. at 321, 122 S.Ct. 2242. This reality explains why prosecutors, pre-*Atkins*, had little incentive vigorously to contest evidence of retardation.... Because the change in law substantially altered the State's incentive to contest Bies' mental capacity, applying preclusion would not advance the equitable administration of the law.

Bies, 129 S.Ct. at 2153. Accordingly, we deny relief on this claim.

For the foregoing reasons, we affirm the court's denial of Hall's 3.203 motion.

It is so ordered.

POLSTON, C.J., LEWIS, and CANADY, JJ., concur.
PARIENTE, J., concurs with an opinion.
LABARGA, J., dissents with an opinion, in which PERRY, J., concurs.
PERRY, J., dissents with an opinion, in which LABARGA, J., concurs.
QUINCE, J., recused.
PARIENTE, J., concurring.

In 1991, the trial judge who sentenced Freddie

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Lee Hall to death found Hall to be mentally retarded. Yet, in 2010, the same trial judge found the same defendant not to be mentally retarded. What is the reason for this apparent anomaly? The answer *712 lies in the fact that the trial court in 2010 was applying the statutory definition of mental retardation that acts as a bar to execution, which did not exist in 1991. Between 1991 and 2010, two developments in the law occurred: (1) the Legislature enacted section 921.137(1), Florida Statutes (2001); and (2) the United States Supreme Court decided the case of *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

In *Atkins*, the United States Supreme Court dramatically changed the legal landscape pertaining to mental retardation and death penalty jurisprudence. The Supreme Court held that it was unconstitutional under the Eighth Amendment for a mentally retarded person to be executed, but the Court also left to the states "the task of developing appropriate ways to enforce the constitutional restriction" on the execution of such individuals. *Id.* at 317, 122 S.Ct. 2242 (quoting *Ford v. Wainwright*, 477 U.S. 399, 416–17, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986)).

In Florida, our jurisprudence on this issue is constrained by the Legislature's enactment, as long as the Legislature defines mental retardation within the constitutional parameters of *Atkins*. As set forth in *Cherry v. State*, 959 So.2d 702 (2007), the defendant must present evidence of a significant subaverage general intellectual functioning as a threshold for establishing mental retardation. This requirement derives from the language of section 921.137(1), Florida Statutes, which this Court in *Cherry* interpreted as providing a "strict cutoff of an IQ score of 70 in order to establish significantly subaverage intellectual functioning." *Cherry*, 959 So.2d at 712. Based on the legislative definition of mental retardation, the Court rejected the application of the standard error of measurement (SEM) to the IQ score—not because we considered it the better policy but because we were adhering to the plain language of the statute. *Id.* at 712–14.

Applying both the statutory definition and our precedent in this case, the trial court found that there was not competent, substantial evidence to support a finding of an IQ score at or below 70. An outlier test, which was performed by Dr. Mosman, could not be considered because Dr. Mosman's testimony had not been preserved prior to his death.

Nearly twenty years before, in 1991, the trial court resentenced Hall to death and found him to be mentally retarded as a mitigating factor with "unquantifiable" weight. Yet the circumstances in 1991 were different. In 1991, Hall's evidence went unchallenged, whereas in 2010, there was a true adversarial testing of whether Hall was mentally retarded under Florida's statutory definition of mental retardation. In contrast to the 2010 postconviction hearing, during Hall's 1991 resentencing, the State did not contest the evidence Hall presented, but instead relied on its own evidence to establish seven strong aggravators to outweigh the mitigators.

Although the State in 1991 did not contest whether Hall suffered from mental retardation, the trial court noted throughout the sentencing order that it was troubled as to whether the mental health experts presented by the defendant had exaggerated Hall's inabilities. The trial court made certain statements throughout the sentencing order that questioned whether Hall suffered from mental retardation, including an in-depth discussion as to whether his behavior and abilities were consistent with a person who had mental retardation. The court explained in relevant part as follows:

> [Hall's] behavior at the time of the crimes for which he stands convicted, as well as some of the statements that he *713 made previously ... would belie the fact of his severe psychosis and mental retardation. Nothing of which the experts testified could explain how a psychotic, mentally-retarded, brain-damaged, learning-disabled, speech-impaired person could formulate a plan whereby a car was stolen and a convenience store

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was robbed. Bear in mind that the facts of this case conclusively showed that Freddie Lee Hall was the one that kidnapped Karol Lea Hurst from the Pantry Pride grocery store. Freddie Lee Hall alone was the one that drove Karol Lee Hurst, in broad daylight, through the city of Leesburg to a spot in the woods some eighteen miles distant. There is no evidence as to whether or not Freddie Lee Hall possessed a driver's license, but he was certainly driving a car in broad daylight through city traffic with a kidnapped victim inside.... Nothing in the evidence can explain how Freddie Lee Hall could live a more or less normal life, obtain employment, and substantially remain outside of violation of the law during the five (5) years that he was on parole after his first rape conviction. Nothing in the evidence can explain the statements that the defendant made when he testified in his own behalf during his first trial.... In other words, the clinical characterization of the defendant presented by the testimony of the defense experts does not seem to comport with the other evidence of the defendant's background and behavior that are clear from other aspects of the evidence in this case. Thus, this Court believes that the evidence of the experts, for whatever reason or reasons, is exaggerated to some extent.

When discussing mental retardation, the trial judge found as follows: "There is substantial evidence in the record to support this finding. Again, however, there is difficulty in relating this factor back to determine how it affected the defendant's state of mind at the time of the crime. The mitigating factors of this fact are thus 'unquantifiable.' " In evaluating the mitigation in conjunction with the aggravation, the court again noted concerns as to whether the evidence showed that Hall was in fact mentally retarded, stating that "the defendant shows more deliberation and planning than that which might be attributed to a typical retarded defendant."

In 1999, when Hall filed his initial motion for postconviction relief, the trial court again expressed reservations on the issue of mental retardation, stating that Hall "is *probably somewhat* retarded." *Hall v. State* (*Hall VIII*), 742 So.2d 225, 230 (Fla.1999)(emphasis added). At that time, I joined with Justice Anstead in relying on Justice Barkett's position that executing mentally retarded individuals is cruel and unusual punishment, a position that later became the holding of the United States Supreme Court in *Atkins*. *Hall VIII*, 742 So.2d at 231 (Anstead, J., specially concurring).

When those decisions were rendered in 1991 and 1999, *Atkins* had not yet established the prohibition on executing mentally retarded individuals as cruel and unusual punishment. A trial court could find that a defendant was mentally retarded without regard to any statutory definition of mental retardation and those findings would serve as mitigation in much the same way as mental illness or brain damage. Therefore, because mental retardation was not a bar to execution, the State would not have had the same interest in controverting the expert testimony if, as occurred here, there was such overwhelming evidence in aggravation. Thus, as it applies to this case, until this current postconviction proceeding, there was no true *714 adversarial testing on the issue of whether Hall's mental deficits qualified as mental retardation under a statutory definition that was enacted only after Hall's direct appeal and prior postconviction proceedings.

I appreciate the views expressed in the dissents written by Justice Labarga and Justice Perry. I echo the sentiment that Justice Labarga highlights in his dissent: "[T]he imposition of an inflexible bright-line cutoff score of 70, even if recognized as often describing the upper range of mild mental retardation, is not in every case an appropriate way to enforce the restriction on execution of the mentally retarded." Dissenting op. at 27 (Labarga, J.). Unquestionably, clinical definitions of mental retardation recognize the need for application of the SEM and the use of clinical judgment. In fact, the American Psychiatric Association (APA) proposes a revision to the definition of mental retardation that will replace the use of a numerical score for mental

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retardation and instead refer to an Intellectual Development Disorder (IDD). However, unless this Court were to recede from *Cherry*, 959 So.2d at 712–13, as reaffirmed in *Nixon v. State*, 2 So.3d 137, 142–43 (Fla.2009), and more recently in *Franqui v. State*, 59 So.3d 82, 92–94 (Fla.2011), a plain language interpretation of Florida's bright-line cutoff score of 70 will remain the rule of law in this state.

Florida, while not unique in its use of a bright-line cutoff score of 70, is not in the majority, although there is no clear national consensus. Among the states around the nation that continue to have the death penalty, ten states have a statutory bright-line rule that do not apply the SEM, including Florida.[FN4] On the other hand, sixteen states do apply the SEM, including ten states without a statutory bright-line cutoff.[FN5] At least an additional two states through court decision do not apply the SEM.[FN6] The application of the SEM to IQ *715 scores in the remaining four states is unclear.[FN7]

FN4. These states are the following: Arkansas (Ark.Code Ann. § 5–4–618(a)(2) (2012)); Delaware (Del.Code Ann. tit. 11, § 4209(d)(3) (2012)); Florida (§ 921.137(1), Fla. Stat. (2012)); Idaho (Idaho Code Ann. § 19–2515A(1)(b) (2012)); Kentucky (Ky.Rev.Stat.Ann. § 532.130(2) (2012)); Maryland (Md.Code Ann., Crim. Law § 2–202(b)(1)(i) (2012)); North Carolina (N.C.Gen.Stat.Ann. § 15A–2005(a)(1) (2012)); Tennessee (Tenn.Code Ann. § 39–13–203(a)(1) (2012)); Virginia (Va.Code Ann. § 19.2–264.3:1.1(A) (2012)); and Washington (Wash. Rev.Code Ann. § 10.95.030(2)(c) (2012)).

FN5. The states that apply the SEM without a statutory bright-line rule are as follows: California, *see In re Hawthorne*, 35 Cal.4th 40, 24 Cal.Rptr.3d 189, 105 P.3d 552, 557–58 (2005); Georgia, *see Stripling v. State*, 261 Ga. 1, 401 S.E.2d 500, 504 (1991); Indiana, *see Woods v. State*, 863 N.E.2d 301, 303–04 (Ind.2007); Mississippi, *see Chase v. State*, 873 So.2d 1013, 1028 n. 18 (Miss.2004); Missouri, *see State v. Johnson*, 244 S.W.3d 144, 153 (Mo.2008) (en banc); Nevada, *see Ybarra v. State*, 247 P.3d 269, 274–76 (Nev.2011), *cert. denied*, — U.S. —, 132 S.Ct. 1904, 182 L.Ed.2d 776 (2012); Ohio, *see State v. Were*, 118 Ohio St.3d 448, 890 N.E.2d 263, 293 (2008); Pennsylvania, *see Comm. v. Miller*, 585 Pa. 144, 153–54, 888 A.2d 624 (Pa.2005); Texas, *see Ex parte Hearn*, 310 S.W.3d 424, 430 (Tex.Crim.App.2010); and Utah, *see State v. Maestas*, No. 20080508, 299 P.3d 892, 947, 2012 WL 3176383, at *41 (Utah July 27, 2012).

The states that apply the SEM but include a statutory bright-line cut-off are as follows: Arizona, *see State v. Grell*, 212 Ariz. 516, 135 P.3d 696, 701 (2006); Louisiana, *see State v. Dunn*, 41 So.3d 454, 470 (La.2010); Nebraska, *see State v. Vela*, 279 Neb. 94, 777 N.W.2d 266, 304–05 (2010); Oklahoma, *see Smith v. State*, 245 P.3d 1233, 1237 (Okla.Crim.App.2010); Oregon, *see* Or.Rev.Stat. Ann. § 427.005(10)(b) (2012); and Tennessee, *see Coleman v. State*, 341 S.W.3d 221, 245–47 (Tenn.2011).

FN6. These states are: Alabama, *see Ex parte Perkins*, 851 So.2d 453, 455–56 (Ala.2002); and Kansas, *see State v. Backus*, 287 P.3d 894, 905 (Kan.2012).

FN7. These states are New Hampshire, South Carolina, South Dakota, and Wyoming.

This national survey of the states that have the death penalty illustrates that there is no clear consensus among the states regarding the use of the

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SEM, but the use of a bright-line cut off in some states versus the use of the SEM in other states indicates that there will be some inconsistency in findings of mental retardation based on the exact same circumstances.

It is certainly of concern that in some states Hall would be mentally retarded by those states' definitions, while in others, like Florida, the bright-line cutoff requires a contrary finding. Unfortunately, mental retardation, unlike age, is not a fixed objective test, and therefore these variations appear to have been contemplated by the United States Supreme Court when *Atkins* was decided. For example, the State of Texas, which leads the nation in executions, declined to establish a bright-line IQ cut off for execution without "significantly greater assistance from the legislature." *Ex parte Hearn*, 310 S.W.3d 424, 430 (Tex.Crim.App.2010). The *Hearn* Court stated that any IQ score could actually represent an IQ that is either five points higher or five points lower than the person's actual IQ after factoring in the SEM. *Id.* at 428.

At some point in the future, the United States Supreme Court may determine that a bright-line cutoff is unconstitutional because of the risk of executing an individual who is in fact mentally retarded. However, until that time, this Court is not at liberty to deviate from the plain language of section 921.137(i). *See Hayes v. State*, 750 So.2d 1, 4 (Fla.1999) ("We are not at liberty to add words to statutes that were not placed there by the Legislature."). Without a change from the Legislature or further direction from the United States Supreme Court, I conclude that the statute adopted by the Legislature and the precedent set forth by this Court require that the trial court's order finding Hall not to be mentally retarded be affirmed.

LABARGA, J., dissenting.

I dissent from the holding of the majority that application of the statutory bright-line cutoff score of a full scale IQ of 70 for determining mental retardation as a bar to execution comports with the Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304, 317, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), under the facts and circumstances of this case. I write to express my deep concern with the fact that even though Hall was found to be retarded long before the Supreme Court decided *Atkins*, and even though evidence was presented below that he remains retarded, we are unable to give effect to the mandate of *Atkins* under the definition of "mental retardation" set forth in section 921.137(1), Florida Statutes (2012). In 1993, on appeal from Hall's resentencing, Justice Barkett, joined by Justice Kogan, pointed out in her dissent that the trial judge in this case found that Hall "has been mentally retarded all of his life." *Hall VII*, 614 So.2d at 479 (Barkett, C.J., dissenting). At that time, mental retardation was not an absolute bar to execution, but was considered generally in mitigation. Subsequently, on postconviction appeal in 1999, Hall's claim that execution of mentally retarded persons violated the United States Constitution was found to be procedurally barred. *See Hall VIII*, 742 So.2d at 226. In his special concurrence in *Hall VIII*, Justice Anstead, joined by Justice Pariente, expressed the view that execution of mentally retarded persons such as Hall violated the Florida Constitution. *Id.* at *716 230–31 (Anstead, J., specially concurring). In 2001, Hall again attempted to obtain relief on his claim that he may not constitutionally be executed because he is mentally retarded. This Court denied relief, noting that the trial court had followed *Penry v. Lynaugh*, 492 U.S. 302, 340, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), in which the Supreme Court had held there is no constitutional bar to prevent execution of the mentally retarded. *See Hall v. Moore*, 792 So.2d 447, 449 (Fla.2001). One year later, the United States Supreme Court overruled *Penry* in *Atkins* and held that execution of the mentally retarded violates the constitutional prohibition against cruel and unusual punishment. *Atkins*, 536 U.S. at 321, 122 S.Ct. 2242. Thus, ever since the trial court found him to be retarded, Hall has urged this Court to hold that, because he is mentally retarded, he may not be executed. But for the vagary of the timing of the trial court's conclusion in relation to the timing of the

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Supreme Court's decision in *Atkins*, Hall would not be on death row today.

The situation present in Florida, in which the Legislature has established a bright-line cutoff score that this Court has upheld, now creates a significant risk that a defendant who has once been found to be mentally retarded may still be executed. I believe this result is not in accord with the rationale underlying the constitutional bar to execution of the mentally retarded, which the United States Supreme Court set forth in *Atkins*. A state's procedural safeguards must protect against an erroneous conclusion that the offender is *not* mentally retarded. In order to meet constitutional muster, I believe that Florida's statutory and rule provisions, which were put into place with the laudable goal of assuring that mentally retarded individuals are not executed, must be crafted—or at a minimum construed—so as to avoid the unwarranted risk of an erroneous mental retardation determination that would allow those who are mentally retarded to be executed.

In its 2005 holding that the Constitution prohibits execution of defendants who were under the age of eighteen at the time of the murder, the Supreme Court in *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), explained:

> The *Atkins* Court neither repeated nor relied upon the statement in *Stanford* [FN8] that the Court's independent judgment has no bearing on the acceptability of a particular punishment under the Eighth Amendment. Instead we returned to the rule, established in decisions predating *Stanford*, that " '*the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.*' " 536 U.S., at 312 [122 S.Ct. 2242] (quoting *Coker v. Georgia*, 433 U.S. 584, 597, 97 S.Ct. 2861 [53 L.Ed.2d 982] (1977) (plurality opinion)). Mental retardation, the Court said, diminishes personal culpability even if the offender can distinguish right from wrong. 536 U.S., at 318 [122 S.Ct. 2242]. The impairments of mentally retarded offenders make it less defensible to impose the death penalty as retribution for past crimes and less likely that the death penalty will have a real deterrent effect. *Id.*, at 319–320 [122 S.Ct. 2242]. Based on these considerations and on the finding of national consensus against executing the mentally retarded, the Court ruled that the death penalty constitutes an excessive sanction for the entire category of mentally retarded offenders, and that the Eighth Amendment " 'places a *717 substantive restriction on the State's power to take the life' of a mentally retarded offender." *Id.*, at 321 [122 S.Ct. 2242] (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 [106 S.Ct. 2595, 91 L.Ed.2d 335] (1986)).
>
> FN8. *Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989).

Roper, 543 U.S. at 563–64, 125 S.Ct. 1183 (emphasis added). Similarly, I urge this Court to bring its own judgment to bear on the question of the constitutional acceptability of the execution of persons who, under all the facts and data reasonably relied upon by mental health experts, have been determined to be mentally retarded when the execution is permitted solely by the Legislature's inflexible definition of mental retardation. The Court in *Roper* reminds us that the prohibition against cruel and unusual punishment in the Eighth Amendment must be interpreted in part "with due regard for its purpose and function in the constitutional design." *Id.* at 560, 125 S.Ct. 1183. "To implement this framework we have established the propriety and affirmed the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual." *Id.* at 560–61, 125 S.Ct. 1183. The Supreme Court noted that when it decided *Atkins*, "[w]e held that standards of decency have evolved since *Penry* and now demonstrate that execution of the mentally retarded is cruel and unusual punishment." *Roper*, 543 U.S. at 563, 125 S.Ct. 1183. The difficulty has

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been in finding a reliable way in which to determine which capital defendants fall into this class of persons for whom execution is barred.

The *Atkins* Court noted that the accepted definitions for mental retardation refer in pertinent part to "significantly subaverage intellectual functioning." *Atkins*, 536 U.S. at 308 n. 3, 122 S.Ct. 2242. That Court did not prescribe any specific IQ score as a bright-line cutoff, although the Court noted that "mild" mental retardation is typically used to describe people with an IQ level range of 50 to 70. *Id.* However, this typical description was not given as a mandated cutoff score, and the Court later noted that "[t]o the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded." *Id.* at 317, 122 S.Ct. 2242. This prediction certainly proved prescient in Florida, as Florida courts have continued to struggle with evaluation of the claims of mental retardation raised by capital defendants. I recognize that it is because of this very difficulty in determining which offenders are in fact mentally retarded that the Supreme Court left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Id.* (quoting *Ford v. Wainwright*, 477 U.S. 399, 416–17, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986)). We must focus, however, on the Supreme Court's mandate that the ways developed by the States must actually be "appropriate" to enforce the restriction. In my view, the imposition of an inflexible bright-line cutoff score of 70, even if recognized as often describing the upper range of mild mental retardation, is not in every case an appropriate way to enforce the restriction on execution of the mentally retarded. This is true where, as here, ample evidence has been presented that the defendant has been mentally retarded from an early age despite the achievement of an IQ score over 70 on IQ testing. The Supreme Court barred execution of mentally retarded individuals based in part on the evolving standards of decency in our maturing society, and those standards should include thoughtful consideration of all the factors that mental health professionals consider in determining whether an individual is mentally retarded, without application*718 of an inflexible, oftentimes arbitrary, bright-line cutoff IQ score.

In 2010, the United States Supreme Court decided *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), in which it held that sentencing juvenile offenders to life in prison without the possibility of parole for non-homicide offenses violates the Cruel and Unusual Punishment clause of the United States Constitution. *Id.* at 2034. In explaining its decision, the Court noted that in *Atkins* it barred execution of offenders "whose intellectual functioning is in a low range." *Id.* at 2022. Hall certainly meets that standard and has met that standard for his entire life.

The United States Supreme Court has not been unwilling to recede from or overrule its precedent when it concludes that execution of certain classes of persons violates the Eighth Amendment. Nor should this Court be unwilling to do the same. Where, as here, the evidence has long established that a defendant is functionally mentally retarded, I believe there is a justifiable concern of constitutional magnitude in putting such a defendant to death. That same concern should lead this Court to revisit its precedent that has heretofore bound this Court to the inflexible test set forth by the Legislature for identification of mentally retarded persons who are not constitutionally subject to execution. For all the foregoing reasons, I also encourage the Legislature to reexamine its definition of mental retardation set forth in section 921.137(4), in light of the principles set forth in the United States Supreme Court's decision in *Atkins*.

PERRY, J., concurs.

PERRY, J., dissenting.

If the bar against executing the mentally retarded is to mean anything, Freddie Lee Hall cannot be executed. Hall "has been retarded his whole life." I do not disagree with my esteemed colleagues that section 921.137(1), Florida Statutes (2012), and our caselaw provide that a defendant

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must establish an IQ below 70 to be ineligible to be executed, but that statute as applied here reaches an absurd result. Because this is my belief, I respectfully dissent.

The record before us is replete with indications of Hall's mental retardation. This Court has twice noted the evidence demonstrating Hall's mental retardation:

> The testimony reflects that Hall has an IQ of 60; he suffers from organic brain damage, chronic psychosis, a speech impediment, and a learning disability; he is functionally illiterate; and he has a short-term memory equivalent to that of a first grader. The defense's four expert witnesses who testified regarding Hall's mental condition stated that his handicaps would have affected him at the time of the crime. As the trial judge noted in the resentencing order, Freddie Lee Hall was "raised under the most horrible family circumstances imaginable."
>
> Indeed, the trial judge found that Hall had established substantial mitigation. The judge wrote that the evidence conclusively demonstrated that Hall "may have been suffering from mental and emotional disturbances and may have been, to some extent, unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." Additionally, the judge found that Hall suffers from organic brain damage, has been mentally retarded all of his life, suffers from mental illness, suffered tremendous emotional deprivation and disturbances throughout his life, suffered tremendous physical abuse and torture as a child, and has learning disabilities and a distinct speech impediment*719 that adversely affected his development.
>
> Hall's mental deficiency as an adult is not surprising. The sixteenth of seventeen children, Hall was tortured by his mother and abused by neighbors. Various relatives testified that Hall's mother tied him in a "croaker" sack, swung it over a fire, and beat him; buried him in the sand up to his neck to "strengthen his legs"; tied his hands to a rope that was attached to a ceiling beam and beat him while he was naked; locked him in a smokehouse for long intervals; and held a gun on Hall and his siblings while she poked them with sticks. Hall's mother withheld food from her children because she believed a famine was imminent, and she allowed neighbors to punish Hall by forcing him to stay underneath a bed for an entire day.
>
> Hall's school records reflect his mental deficiencies. His teachers in the fourth, sixth, seventh, and eighth grades described him as mentally retarded. His fifth grade teacher stated that he was mentally maladjusted, and still another teacher wrote that "his mental maturity is far below his chronological age."

Hall VIII, 742 So.2d at 231 (Anstead, J. specially concurring) (quoting *Hall VII*, 614 So.2d at 479–80 (Barkett, C.J. dissenting)). Hall is a poster child for mental retardation claims because the record here clearly demonstrates that Hall is mentally retarded. The fact that our statutory standard does not agree only serves to illustrate a flaw in the statute.

As the United States Supreme Court articulated in *Atkins*, those with disabilities in areas of reasoning, judgment, and control of their impulses "do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." *Atkins*, 536 U.S. at 306, 122 S.Ct. 2242. Indeed, "our society views mentally retarded offenders as categorically less culpable than the average criminal." *Id.* at 316, 122 S.Ct. 2242. Thus, while there is agreement about the execution of mentally retarded offenders, there remains disagreement, and difficulty, in determining which offenders are retarded. "Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." *Id.* at 317, 122 S.Ct. 2242. *Atkins* thus left this determination to the states.

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Prior to *Atkins*, this State adopted section 921.137, which provides in relevant part:

> The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities.
>
> § 921.137(1), Fla. Stat. (2012)

As we observed in *Cherry*, mental health practitioners are expected to look at IQ as a range rather than an absolute.

> The concept of mental retardation is considered to be a range or band of scores, not just one score or a specific cutoff for mental retardation. The idea behind that is there's recognition that no one IQ score is exact or succinct, that there's always some variability and some error built in.
>
> And the Diagnostic and Statistical manual which is what we—meaning the mental health professionals—rely on when arriving at diagnostic hypotheses. That manual guides us to look at IQ scores as being a range rather than absolute. And the manual talks about a score from 65, a band, so to speak, from *720 65 to 75—and of course, lower than 65—comprising mental retardation.

Cherry, 959 So.2d at 711–12 (quoting Dr. Peter Bursten). Nevertheless, this Court was constrained by the language of the statute and found that an IQ higher than 70 failed to meet the first prong of section 921.137(1), and that no further inquiry was necessary. *Id.* at 714.

Thus far, our interpretation of the statute and applicable rule has led us to a dogged adherence to a bright-line cutoff of a score of 70 on the IQ test. FN9 Yet, even when a defendant is able to demonstrate a lower IQ, the rest of the statute allows the courts to reason that the defendant is not mentally retarded. *See, e.g., Dufour v. State*, 69 So.3d 235, 244–53 (Fla.2011) (finding that despite IQ scores of 62, 67, and 74, Dufour failed to establish deficits in adaptive functioning because he was able to complete his GED and live independently); *Hodges v. State*, 55 So.3d 515, 527, 535 (Fla.2010)(finding that although Hodges had IQ scores of 62, 66, and 69, he did not establish deficits in adaptive functioning because he was able to copy letters drafted by others and sign his own name and was able to support himself as a short-order cook, garbage collector, and dishwasher); *Rodgers v. State*, 948 So.2d 655, 661 (Fla.2006) (finding that the trial court did not err in finding that the defense expert's recitation of Rodgers' IQ of 69 was less credible evidence than court-appointed experts who found higher IQs); *Burns v. State*, 944 So.2d 234, 248 (Fla.2006) (finding that despite an IQ of 69, Burns was unable to establish deficits in adaptive functioning because he was able to support himself); *Rodriguez v. State*, 919 So.2d 1252, 1266 (Fla.2005) (finding that despite his low IQ, his behavior in trial proceedings indicated that he was not mentally retarded). We have interpreted the statute as requiring a threshold for the courts to even consider retardation, but then allow the same courts to subjectively reason away the bar to execution. Thus, under this interpretation of the statutory scheme, a defendant can be found mentally retarded but not have it serve as a bar to execution because his IQ is too high, and if his IQ is low enough, he can still be found not to be mentally retarded because he can hold a pen to paper. Thus, it appears there is no reasonable way to be declared mentally retarded for the purposes of proving ineligibility for execution in Florida. If the proscription against executing the mentally retarded is to mean anything, it cannot be wielded as this double-edged sword.

> FN9. This is so even despite subsection four of section 921.137, which provides, in part:
>
> > At the final sentencing hearing, the court shall consider the findings of the court-appointed experts and consider the find-

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> ings of any other expert which is offered by the state or the defense on the issue of whether the defendant has mental retardation.
>
> § 921.137(4), Fla. Stat. (2012); *see also* Fla. R. Admin. P. 65G–4.011(2) (2012).

The current interpretation of the statutory scheme will lead to the execution of a retarded man in this case. Hall had been found by the courts to be mentally retarded before the statute was adopted. Once the statute is applied, Hall morphs from someone who has been "mentally retarded his entire life" to someone who is statutorily barred from attempting to demonstrate concurrent deficits in adaptive functioning to establish retardation. Because this cannot be in the interest of justice, I dissent.

LABARGA, J., concurs.

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APPENDIX B

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT IN AND FOR HERNANDO COUNTY, FLORIDA

STATE OF FLORIDA,

vs.

CASE NO.: 1978-CF-0052

FREDDIE LEE HALL,

Defendant.

_____/

***AMENDED[1] ORDER DENYING DEFENDANT'S SUCCESSIVE MOTION UNDER FLORIDA RULES OF CRIMINAL PROCEDURE 3.851 AND 3.203, BARRING EXECUTION OF THE DEFENDANT DUE TO MENTAL RETARDATION**

In this Order, references to the Transcript of the December 7 and 8 Evidentiary Hearing will be denoted by the letter R, followed by the page number(s).

THIS CAUSE comes before this Court on Defendant's "Successive Motion Pursuant to Florida Rules of Criminal Procedure 3.851 and 3.203, Barring Execution of the Defendant Due to Mental Retardation," and this Court, having conducted a full evidentiary hearing on the matter on December 7 and 8, 2009, and having reviewed the file, the Defendant's Motion, the State's Response to Defendant's Successive Motion, considered the transcript of the evidentiary hearing, conducted independent research and being fully advised in the premises hereby finds as follows:

1. On February 21, 1991, Defendant was sentenced to death for first degree murder. Defendant's sentence was affirmed by the Florida Supreme Court. *See Hall v. State,* 614 So.2d 473 (Fla. 1993).
2. On November 20, 2004, Defendant filed the instant motion, "Successive Motion Pursuant to Florida Rules of Criminal Procedure 3.851 and 3.203, Barring Execution of the Defendant Due to Mental Retardation." Attached to Defendant's Motion was a Confidential Evaluation of Defendant conducted by Dr. Gregory A. Prichard. In support of its motion, Defendant relies on *Atkins v. Virginia*, 536 U.S. 304; 122 S.Ct. 2242 (U.S.

[1] *Amended Order pursuant to Attorney Tatti's correspondence dated May 27, 2010 in reference to Dr. Mosman's report stated in Paragraphs 18 and 19. In paragraphs 18 and 19 of the Circuit Court's original order dated May 21, 2010, the Court errantly states that the Defendant failed to provide the State with a copy of Dr. Mosman's report pursuant to the Court's February 1, 2005, *Order to Compel.* This order amends that language to state that the Defendant failed to provide the raw data and testing materials underlying Dr. Mosman's report, not the report itself.

2002). In *Atkins*, the United States Supreme Court held that it was unconstitutional and in derogation of the Eighth Amendment of the United States Constitution, for a mentally retarded individual to be executed. *Atkins*, 536 U.S. at 321; 122 S.Ct. at 2252. However, the Supreme Court cautioned "we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Atkins*, at 405, 416-417; 106 S.Ct. 2595.

3. On December 15, 2004, the State of Florida filed its, "Response to Successive Motion Pursuant to Florida Rules of Criminal Procedure 3.851 and 3.203" and a "Motion to Compel and Motion for Appointment of Expert Witness."
4. On or about February 1, 2005, the Court granted the State's "Motion to Compel" and ordered Defendant to provide the State with (1) copies of any and all raw data and notes associated with the psychological evaluation/assessment of the Defendant by Dr. Gregory Prichard, including any and all psychological tests and answer sheets; (2) copies of any an all written or recorded material provided by the Defendant to Dr. Prichard or independently obtained by or on behalf of Dr. Prichard; and (3) copies of any and all psychological or psychiatric reports provided to Dr. Prichard, including testing material, raw data and notes associated with the said reports, and including any and all reports which are not specifically referenced in Dr. Prichard's report.
5. On or about December 2, 2009, the State of Florida filed a "Motion in Limine" in which the State sought to limit the Defendant's presentation of evidence in light of Florida Statute §921.137, subsection (1), and governing case law interpreting the Statute. In *Cherry v. State*, the Florida Supreme Court held that because "Cherry does not meet the first prong of the section 921.137(1) criteria, we do not consider the two other prongs of the mental retardation determination." *Cherry v. State*, 959 So.2d 702, 713 (Fla. 2007). In light of *Cherry*, the State asked that the Court limit the Defendant's presentation of evidence by requiring Defendant to first prove the first component of his mental retardation claim, a significant subaverage general intellectual functioning.
6. On December 7, 2009, Defendant filed a response to the State of Florida's *Motion in Limine*.
7. On December 7 and 8, 2009, the Court held a two day evidentiary hearing on Defendant's motion, *Successive Motion Pursuant to Florida Rules of Criminal Procedure 3.851 and 3.203, Barring Execution of the Defendant Due to Mental*

Retardation.

8. Florida Statute §921.137, subsection (1) states: "the term 'mental retardation' means significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age." In interpreting the Statute, the Florida Supreme Court established a three pronged, conjunctive test where a defendant must prove each prong by clear and convincing evidence in order to prevail on a claim of mental retardation. *Jones v. State,* 966 So.2d 319, 325 (Fla. 2007); *see also Burns v. State,* 944 So.2d 234, 245 (Fla. 2006).
9. In *Jones,* the Florida Supreme Court held that a diagnosis of mental retardation requires three findings: (1) significantly subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) onset of the condition before age 18. *Jones,* 966 So.2d at 325.
10. The Florida Supreme Court has interpreted the first component (*i.e.* a significant subaverage general intellectual functioning) of a mental retardation claim to mean that a defendant must show an IQ score of 70 or below in order to show a significantly subaverage general intellectual functioning. *Cherry v. State,* 959 So.2d at 713; *see also Zack v. State,* 911 So.2d at 1201(Under Florida law, one of the criteria to determine if a person is mentally retarded is that he or she has an IQ of 70 or below.)
11. In *Cherry,* the Florida Supreme Court affirmed the lower court's holding that denied Defendant's mental retardation claim under Fla. Stat. §921.137(1) when Defendant failed to submit an IQ score that was 70 or lower. In affirming the lower court, the Florida Supreme Court held that because Cherry "does not meet the first prong of the section 921.137(1) criteria, we do not consider the two other prongs of the mental retardation determination." *Cherry v. State,* 959 So.2d at 713.
12. Upon considering the State's *Motion in Limine* and the Defendant's response to the State's Motion, and after considering Florida Statute §921.137, Florida Rule of Criminal Procedure Rule 3.203, and the governing case law applicable to the Statute and Rule, the Court granted the State's *Motion in Limine* at the outset of the evidentiary hearing of December 7, 2009 (R. 32).
13. In granting the State's *Motion in Limine,* the Court ordered the Defendant to first provide clear and convincing evidence in support of component (1) one (*i.e.* significant subaverage general intellectual functioning) of his mental retardation claim before

offering any evidence in support of the second (*i.e.* concurrent deficits in adaptive behavior) and third (*i.e.* onset of the condition before age 18) components of his mental retardation claim. (R. 31-32). Under the guidance of *Cherry*, the Court reasoned that a determination of whether the Defendant has met the second and third components of his mental retardation claim would be legally insufficient if the Defendant has failed to meet the first component (*i.e.*significant subaverage general intellectual functioning) of his mental retardation claim, since each component of a mental retardation claim must be established by clear and convincing evidence. *Nixon v. Florida*, 2 So.3d 137, 143 (Fla. 2009); § 921.137(1), Fla. Stat. (2007); Fla. R.Crim. P. 3.203(b).

14. During the course of the evidentiary hearing of December 7 and 8, 2009, the Defendant called a number of witnesses. Defendant's first witness was Dr. Valerie McClain. Dr. McClain testified that she did not obtain an I.Q. measurement from the Defendant, nor did she provide any testimony regarding the Defendant's I.Q. The Defendant's second witness was Lugene Ellis, a half-brother of the Defendant. Mr. Ellis testified regarding his recollection of the Defendant as a child but did not provide any quantitative testimony regarding the Defendant's I.Q. The Defendant's next witness was James Hall, a brother of the Defendant. Mr. Hall testified about the Defendant's problems with reading, writing, and caring for himself, but did not provide any quantitative testimony regarding the Defendant's I.Q.

15. On the second day of the evidentiary hearing, the Defendant called his final two witnesses. Defendant's first witness that day was Dr. Harry Krop. Dr. Krop testified that he conducted a confidential mental health evaluation of the Defendant in September of 1990, prior to the Defendant's resentencing proceeding. In preparation of the Defendant's September of 1990 evaluation, Dr. Krop testified that he reviewed multiple reports from a number of doctors, numerous witness affidavits, legal documents, police reports, school records, and prison reports all relating to the Defendant. (R. 110). In addition, Dr. Krop testified that he spoke with several members of the Defendant's family. In that same year, Dr. Krop testified that he administered the *Wechsler Adult Intelligence Scale Revised* to the Defendant and obtained an I.Q. score of seventy-three (73). (R. 120). Furthermore, Dr. Krop testified on cross-examination that he examined a report generated by Marilyn Feldman that indicated Feldman administered the *Wechsler Adult Intelligence Scale Revised* to the Defendant and obtained an I.Q. score of eighty

(80), in 1986. (R. 128).

16. The Defendant's final witness was Dr. Gregory Prichard. Dr. Prichard evaluated the Defendant on August 14 and 15, 2002 for a determination of mental retardation. In compliance with Florida Rule of Criminal Procedure Rule 3.203(c)(2), Defendant attached Dr. Gregory Prichard's report, styled *Confidential Assessment*, to the subject motion. Dr. Prichard testified that on August 15, 2002, he administered the *Wechsler Adult Intelligence Scale Third Edition* to the Defendant and determined that the Defendant's I.Q. score was seventy-one (71). (R. 218). In addition to administering the *Wechsler Adult Intelligence Scale Third Edition*, Dr. Prichard also administered the *Vineland Adaptive Behavior Scales* and the *Wide Range Achievement Test*. (R. 215).
17. During the course of the Defendant's two-day evaluation, Dr. Prichard also reviewed a vast amount of information and reports relating to the Defendant. Dr. Prichard examined reports from a number of doctors and researchers of which one, a report generated by Dr. Bill E. Mosman, was of particular significance to the Defendant. The Defendant attempted to introduce a report generated by a Dr. Bill E. Mosman through the testimony of Dr. Prichard on direct examination. (R. 162). Dr. Mosman's November 19, 2001 report indicated that the Defendant obtained an I.Q. score of sixty-nine (69), using the *Wechsler Adult Intelligence Scale Third Edition*. Importantly, Dr. Mosman's report lacked critical detail and information indicating how he obtained Defendant's intelligence quotient of sixty-nine (69). In particular, Dr. Mosman's report lacked discussion as to the testing instrument he used and how he used it in evaluating the Defendant, lacked discussion regarding the raw data that Dr. Mosman may have complied and examined in evaluating the Defendant, and lacked discussion on any other notes that may have related to Dr. Mosman's evaluation of the Defendant. (R. 162).
18. Upon the State's objection of the Defendant's attempt to introduce Dr. Mosman's report through the testimony of Dr. Prichard, the Court determined that Dr. Mosman's report did not constitute competent evidence and therefore, was ruled as inadmissible evidence. In support of its determination, the Court found that the Defendant violated the Court's Feburary 1, 2005 *Order to Compel* by not providing the State with the testing materials and raw data underlying Dr. Mosman's report. (R. 162). Specifically, the Court's *Order to Compel* ordered the Defendant to provide the State with (1) copies of any and all raw data and notes associated with the psychological

evaluation/assessment of the Defendant by Dr. Gregory Prichard, including any and all psychological tests and answer sheets; (2) copies of any an all written or recorded material provided by the Defendant to Dr. Prichard or independently obtained by or on behalf of Dr. Prichard; and (3) copies of any and all psychological or psychiatric reports provided to Dr. Prichard, including testing material, raw data and notes associated with the said reports, and including any and all reports which are not specifically referenced in Dr. Prichard's report. (Order dated February 1, 2005).

19. The Court found that the Defendant's failure to furnish the State with the raw data and testing materials underlying Dr. Mosman's report pursuant to the Court's Order, was highly prejudicial and unfair to the State. (R.162). Moreover, the Court determined that the prejudice and unfairness to the State could not be cured by the Defendant because Dr. Mosman was unavailable for cross-examination (Dr. Mosman was deceased), and neither the Defendant nor Dr. Prichard had the raw material that Dr. Mosman may have used in his evaluation of the Defendant. Without access to the test instrument or raw material that Dr. Mosman may have used, the State could not test the validity of Dr. Mosman's results through the use of its own hired expert. (R. 162). For these reasons, and because the Defendant failed to comply with the Court's February 1, 2005 *Order to Compel,* the Court excluded Dr. Mosman's report from evidence. However, the Court allowed the Defendant to proffer Dr. Mosman's report on record through Dr. Prichard's testimony.

20. During the course of the hearing, it became apparent that the Defendant could not provide clear and convincing evidence that would satisfy the first prong (*i.e.* significant subaverage general intellectual functioning) of its mental retardation claim. In effect, the Defendant was unable to show substantial competent evidence that indicated an I.Q score of 70 or lower. Dr. Prichard's report indicated an I.Q. score of seventy-one (71). (R. at 180). Aside from Dr. Mosman's report, the other reports that Dr. Prichard examined all revealed I.Q. scores of 71 or greater. Dr. Prichard testified that he reviewed the following reports that made record of Defendant's I.Q.: Beta Test administered by Department of Corrections in December of 1968: 76 I.Q.; Kent Test administered by Department of Corrections in January of 1979: 79 I.Q.; WAIS-R administered by Marilyn Feldman on September 10, 1986: 80 I.Q.; WAIS-R administered by Dr. Krop in March 1990: 73 I.Q.; WAIS-IV administered by Dr. Sesta

on November 25, 2008: 72 I.Q.

21. Because the Defendant failed to provide clear and convincing evidence that would show a significant subaverage general intellectual functioning, the Defendant's claim of mental retardation under Florida Statute §921.137 and Florida Rule of Criminal Procedure 3.203, fails as a matter of law. Even if Dr. Mosman's report were to be admitted into evidence, it would be an aberration amid all the other I.Q. results that have a score of 71 or higher. One single I.Q. result that falls one point below 70, in contrast to all of the other I.Q. tests showing an I.Q. greater than 70, would not meet the clear and convincing evidence threshold that both the Statute and the Rule require.
22. The Florida Supreme Court has made clear that all three prongs of a mental retardation claim must be met with clear and convincing evidence. *See Burns v. State*, 944 So.2d 234, 249 (Fla. 2006); *Jones v. State*, 966 So.2d 319, 325 (Fla. 2007); Florida Statute §921.137(4). "Thus, lack of proof on any one of these components of mental retardation would result in the defendant not being found to suffer from mental retardation." *Nixon v. Florida*, 2 So.3d 137, 143 (Fla. 2009). At this point, the Defendant's mental retardation claim fails as a matter of law since the Defendant has failed to proffer evidence that would meet the first prong (*i.e.* significantly subaverage general intellectual functioning) of his mental retardation claim. However, in the abundance of caution, the Court will examine the Defendant's evidence proffered in support of the second (*i.e.* concurrent deficits in adaptive behavior) and third (*i.e.* onset of the condition before age 18) prongs of his mental retardation claim.
23. The Florida Supreme Court has held, "defendants claiming mental retardation are required to show that their low IQ is accompanied by deficits in adaptive behavior." *Phillips v. State*, 984 So.2d 503, 510 (Fla. 2008), *citing Rodriguez v. State*, 919 So.2d at 1252, 1266 (Fla.2005). ("[L]ow IQ does not mean mental retardation. For a valid diagnosis of mental retardation ... there must also be deficits in the defendant's adaptive functioning." (quoting trial court's order)). "Adaptive functioning refers to how effectively individuals cope with common life demands and 'how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting.' " *Rodriguez*, 919 So 2d at 1266 n. 8. Furthermore, the Florida Supreme Court has held retrospective diagnosis insufficient to satisfy the adaptive functioning component of the mental retardation definition. In

Philips, the Court stated, "the statute and the rule require significantly subaverage general intellectual functioning to exist *concurrently with* deficits in adaptive behavior. *Phillips*, 984 So.2d at 510, *citing Jones v. State*, 966 So.2d at 325-327,*citing* § 921.137(1), Fla. Stat. (2007); Fla. R.Crim. P. 3.203(b).

24. In *Philips*, the Florida Supreme Court held that the Defendant failed to demonstrate deficits in adaptive functioning that exist concurrently with his significant subaverage general intellectual functioning. *Philips*, 984 So.2d at 511. The Florida Supreme Court stated that while Philips had an IQ of 70 in 2000, "his adaptive functioning was assessed by evaluating his behavior at or around age eighteen." *Id.* at 508. The Court determined this technique, conducted by Philips' only defense expert, Dr. Keyes, to be a retrospective diagnosis, and "insufficient to satisfy the second prong of mental retardation definition." *Id.* at 511, citing *Jones*, 966 So.2d at 325-27.

25. As in *Philips*, in the instant case the Defendant's expert witness, Dr. Prichard, also utilized a retrospective technique in ascertaining Hall's adaptive functioning. Dr. Prichard testified that he made no attempt to determine Hall's level of *present* adaptive functioning at the time he administered the WAIS-III in August of 2002. (emphasis added) (R. 260, 284). Dr. Prichard evaluated the Defendant's sister, Deana Rigsby, and the Defendant's brother, James Hall (R. 236, 239). Dr. Prichard also examined a number of past reports from doctors who have evaluated the Defendant in the past. (R. 241-246). While the Defendant's evidence may yield some support in showing deficits in Defendant's adaptive functioning prior to 2002, the Defendant fails to provide any evidence that shows a *concurrent*, that is, a present deficit in his adaptive functioning.

26. Since the Defendant has been incarcerated in the Department of Corrections since 1978, the logical and necessary inquiry to determine "concurrent" deficits in adaptive functioning would have been to interview correction officers or classification officers, or perhaps, to review records documenting the Defendant's existence and interactions while in the custody of the Department of Corrections. Dr. Prichard concedes as much, stating, "I have done adaptive behavior testing with prison guards before, current adaptive testing. I didn't do it in this case. I don't know why I didn't do it...But I did not interview a Department of Corrections person." (R. 280). In effect, Dr. Prichard engaged in a retrospective diagnosis in determining the Defendant's deficits in adaptive functioning, much like the approach employed by the expert witness in *Philips*. As the

Florida Supreme Court in *Philips* held, "a retrospective diagnosis is insufficient to satisfy the second prong of mental retardation definition." *Phillips,* 984 So.2d at 510, *citing Jones,* 966 So.2d at 325-327.

27. Florida Statute and Rule each make clear that a Defendant must prove each of the three components of a mental retardation claim by clear and convincing evidence. Fla. Stat. 921.137(1)(4); Fla. R.Crim. P. 3.203(b). Thus far, the Defendant has failed to provide any clear and convincing evidence that would meet either of the first two required components of his mental retardation claim. Therefore, as a matter of law, the Defendant's mental retardation claim fails. However, in the abundance of caution, this Court will proceed and consider whether the Defendant has proffered any evidence in support of the third prong of his mental retardation claim (*i.e.* the onset of the first two components occurring prior to the age of 18).

28. Specifically, the third component of a mental retardation claim requires that the onset of the Defendant's alleged significant subaverage intellectual functioning and deficits in concurrent adaptive functioning manifest prior to the age of 18. *See* Fla. Stat. 921.137(1); Fla. R.Crim. P. 3.203. In effect, the third component requires a retrospective assessment in order to determine whether the first two components have manifested prior to the Defendant reaching the age of 18. In support of the third component of his mental retardation claim, the Defendant proffered testimony from two of his siblings, Lugene Ellis and James Hall. While each of them testified to the Defendant's various problems of adaptive functioning as a child and young adult, neither of these witnesses testified specifically about the Defendant's I.Q. The Defendant also relied on Dr. Prichard's testimony to support the third prong of his mental retardation claim, but Dr. Prichard also did not have any quantitative evidence regarding the Defendant's I.Q prior to the age of 18. (R. 219). Dr. Prichard testified that the first I.Q. result of the Defendant was obtained in December of 1968, several years after the Defendant had turned 18 years of age. In that year, the Department of Corrections administered the Beta Test to the Defendant and obtained a score of 76. (R. at 268). In addition, Dr. Prichard testified that he took note of the Defendant's school reports from the years of 1952 to 1961 and testified that each school report indicated cognitive and learning deficiencies. (R.218-219). However, Dr. Prichard testified that none of these school reports indicated a specific I.Q. test result. (R. 218).

29. While the evidence from the Defendant's siblings and Dr. Prichard in support of the third component of the Defendant's mental retardation claim may yield some support towards the Defendant in showing deficits in adaptive behavior prior to the age of 18, this evidence does not necessarily meet the clear and convincing threshold stated within the Statute. *See* Fla. Stat. 921.137(1)(4) Irrespective of whether the Defendant's evidence shows deficits in adaptive behavior prior to the age of 18, the third component also requires that the Defendant provide clear and convincing evidence that his I.Q. score measured 70 or below prior to the age of 18. This the Defendant has not shown. The Defendant has failed to provide any clear and convincing evidence that his I.Q. score was measured at 70 or below prior to 18 years of age. Incidentally, even if the Court were to apply the more lenient preponderance of the evidence standard to the Defendant's evidence, the Defendant would still fail to meet either of the first two prongs of his mental retardation claim, based on the evidence.
30. Ultimately, the Defendant's mental retardation claim fails as a matter of law because the Defendant has failed to provide clear and convincing evidence that would meet any of the three components of a 3.851 mental retardation claim. As the Florida Supreme Court has made clear, "the lack of proof on any one of these components of mental retardation would result in the defendant not being found to suffer from mental retardation." *Nixon v. State*, 2 So.3d at 142.

With these findings, it is hereby

ORDERED AND ADJUDGED that Defendant's "Successive Motion to Florida Rules of Criminal Procedure 3.851 and 3.203, Barring Execution of the Defendant Due to Mental Retardation," is hereby **DENIED.**

Defendant shall have thirty (30) days from the date of this order to file an appeal.

DONE AND ORDERED in chambers, Hernando County, Florida, on this 8th day of June 2010.

RICHARD TOMBRINK Jr.,
Circuit Court Judg3

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to the following individuals by hand delivery and/or U.S. Mail/Courthouse box delivery this 8th day of June, 2010:

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JOINT APPENDIX

RECORD AND BRIEFS

No. 12-10882

Supreme Court, U.S.
FILED
DEC 16 2013
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

FREDDIE LEE HALL,

Petitioner,

v.

FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JOINT APPENDIX VOLUME I OF II
JA1-380

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CERTIORARI GRANTED OCTOBER 21, 2013

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SUMTER COUNTY (FLORIDA) CIRCUIT COURT,
***STATE* V. *HALL*, NO. 78-52-CF**

FILE DATE	INSTRUMENT
	* * *
03/07/78	Capias for first degree murder
	* * *
06/23/78	Verdict—Guilty as charged of murder in the first degree
06/23/78	Judgement adjudicated guilty of crime of murder in the first degree with evidence filed of two other judgements
	* * *
06/26/78	Advisory sentence—majority of jury advises and recommend to the Court that it impose the death penalty upon the defendant
	* * *
06/27/78	Judgement order and sentence guilty to the charge of murder in the first degree—that he be electrocuted until dead in the manner directed by the Laws of the State of Florida
	* * *
06/27/78	Notice of Appeal
	* * *
09/24/81	Mandate Supreme Court of Florida
	* * *
09/28/82	Motion to vacate, set aside or correct conviction and sentence
	* * *

FILE DATE	INSTRUMENT
10/01/82	Statement of the case finding, conclusion and order
10/01/82	Notice of appeal of denial of motion for post conviction relief 3.850 with copy of same
	* * *
11/01/82	Mandate from Supreme Court/the Trial Courts denial of motion to vacate is affirmed and the petition for writ of habeas corpus is denied. The application for stay of execution is denied
	* * *
01/02/87	Motion to vacate set aside or correct conviction and sentence
	* * *
08/16/88	Order on defendant's motion to vacate
	* * *
08/23/88	Consolidated emergency application for stay of execution, motion for evidentiary hearing, supplemental support and proffer for motion for Fla.R.Crim.P. 3.850 relief, factual and evidentiary proffer in support of motion for evidentiary hearing, and points and authorities in support thereof
	* * *
09/07/88	Reply to consolidated emergency application for stay of execution, motion for evidentiary hearing and supplement to Rule 3.850 motion
	* * *

FILE DATE	INSTRUMENT
09/07/88	Defendant's response to the States reply to his request for Rule 3.850 relief and objections to the States proposed order on motion for post conviction relief with copy of order on motion and a newspaper article
	* * *
09/12/88	Notice of appeal of denial of defendants application for stay of execution and motion for post conviction relief
	* * *
03/10/89	Order setting new penalty proceedings for pre-trial conference 03-30-89 and trial to commence 4/17/89
	* * *
05/15/89	Supreme Court of Florida Mandate
06/15/89	Second order setting new penalty proceedings for pre-trial conference and trial. PT 7/5/89 Trial 7/17/89
	* * *
12/17/90	Verdict 8 to 4 impose the death penalty
02/21/91	Finding of fact for sentencing order, summary of facts of the case, history of the case, conclusion and sentence
02/21/91	Judgement and sentence
	* * *
03/04/91	Notice of Appeal
	* * *

FILE DATE	INSTRUMENT
04/23/93	Mandate from Supreme Court of Florida with attached opinion
	* * *
12/07/94	Defendants motion to vacate judgement of conviction and sentence with special request for leave to amend and for evidentiary hearing
	* * *
04/13/95	States response to defendants motion to vacate judgement of conviction and sentence with special request for leave to amend and for evidentiary hearing
05/01/95	Order addressing issues raised in Claim I of defendants motion to vacate judgement of conviction and sentence with special request for leave to amend and evidentiary hearing
	* * *
10/04/95	Defendants amended motion to vacate judgement of conviction and sentence with special request for leave to amend and for evidentiary hearing/verification by Freddie Hall/verification by Bret Strand counsel for defendant
	* * *
02/14/97	Defendants second amended motion to vacate judgement of conviction and sentence with special request for leave to amend and for evidentiary hearing/verification by Freddie Hall/verification by Pamela Izakowitz counsel for defendant

FILE DATE	INSTRUMENT
	* * *
04/11/97	States response to defendants second amended 3.850 motion
	* * *
07/11/97	Order requiring evidentiary hearing in regards to portions of defendants second amended 3.850 motion
	* * *
10/31/97	Final order resolving all 3.850 issues
	* * *
08/05/1999	Mandate from Supreme Court recorded in OR Book 768 pages 192-211
	* * *
08/14/2001	Successor motion to vacate sentence and to declare a provision of FS 921.137 unconstitutional
	* * *
11/30/2004	Successive motion pursuant to Florida Rules of Criminal Procedure 3.851 and 3.203, barring execution of the defendant due to mental retardation
	* * *
12/15/2004	States response to successive motion pursuant to Florida Rules of Criminal Procedure 3.851 and 3.203
	* * *
10/26/2007	Successive motion pursuant to Florida Rules of Criminal Procedure 3.851 and 3.203

FILE DATE	INSTRUMENT
	barring execution of the defendant due to mental retardation
	* * *
07/02/2008	Order denying motion to prohibit relitigation of mental retardation issue in violation of double jeopardy clause and for imposition of life sentence
	* * *
12/07/2009	Order on evidentiary hearing
	* * *
05/26/2010	Order denying defendants successive motion under Florida Rules of Criminal Procedure 3851 and 3203 barring execution of the defendant due to mental retardness
	* * *
06/16/2010	Amended order denying defendants successive motion
	* * *
07/02/2010	Notice of appeal recorded in O R Book 2206 pages 451-453
	* * *

FLORIDA SUPREME COURT, *HALL* V. *STATE*, NO. SC10-1335

Date Docketed	Description	Notes
07/09/2010	NOTICE—APPEAL (3.203)	& NOTICE—APPEAL (3.851)
	* * *	
12/23/2010	INITIAL BRIEF—MERITS	* * *
02/02/2011	ANSWER BRIEF—MERITS	* * *
03/11/2011	REPLY BRIEF—MERITS	* * *
	* * *	
11/03/2011	ORAL ARGUMENT HELD	* * *
	* * *	
12/20/2012	DISP—AFFIRMED	* * *
01/07/2013	MOTION—REHEARING	* * *
01/10/2013	RESPONSE	* * *
03/08/2013	DISP—REHEARING DY	Appellant's Motion for Rehearing is hereby denied. (RC)
03/26/2013	MANDATE	* * *
	* * *	

SUPREME COURT OF FLORIDA

No. 54561

FREDDIE LEE HALL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

July 16, 1981

[403 So. 2d 1321]

* * *

[1322]

PER CURIAM.

Hall was convicted of first-degree murder and sentenced to death. We find no reversible error and affirm.

[1323] Hall and Mack Ruffin were indicted for the murders of Karol Hurst and Deputy Sheriff Lonnie Coburn. Hall was tried alone for the Hurst murder, which is the subject of this appeal.[1]

---

[1] Ruffin, tried separately for the Hurst murder, was convicted and received a death sentence. This Court affirmed. *Ruffin v. State*, 397 So.2d 277 (Fla.1980). Tried together, Hall and Ruffin were convicted of murdering Deputy Coburn. Ruffin received a sentence of life imprisonment while Hall received another death sentence. *Hall v. State*, 403 So.2d 1319 (Fla.1980). Of course, our review of the present case is limited to the record presented in the instant case.

On February 21, 1978, Mrs. Hurst, a 21-year-old housewife who was seven months pregnant, left a Pantry Pride checkout counter in Leesburg, Florida, at 3:00 p.m. Her body was found at 3:00 p.m. on February 22, 1978, in Sumter County. She had been shot and sexually assaulted. In custody on the morning of February 22 for Deputy Coburn's death, Hall told a deputy sheriff how, on the previous day, he and Ruffin had sat in that Pantry Pride parking lot looking for a car to use in committing a robbery when he, Hall, accosted Mrs. Hurst and forced her into her car. Hall slid in behind the steering wheel and drove while Ruffin followed in his own car. They stopped in a wooded area where, according to Hall, Ruffin beat, sexually assaulted, and shot Mrs. Hurst.

At trial the evidence established that, after leaving the wooded area, the pair was seen at a convenience store in Hernando County. Their conduct in the store aroused suspicions and the clerk called the sheriff's office. Before a deputy arrived, Hall and Ruffin left the store. Shortly after their departure the clerk heard a shot and found Deputy Coburn dead on the ground behind the store. Coburn's weapon was missing, but under his body lay the weapon later shown to have killed Mrs. Hurst. Hall and Ruffin fled in the Hurst vehicle, which they had driven to the store, but, after a chase, they abandoned the car and fled on foot. Both men were caught shortly thereafter. They left Coburn's pistol, Mrs. Hurst's handbag, and groceries which she had bought that afternoon in the car.

Hall contends that the state has failed to prove him guilty of first-degree murder. The state presented the case to the jury on the theory that Hall and Ruffin did everything together. They planned the robbery together and drove together to the Pantry Pride parking

lot to obtain a car. Hall drove the Hurst car to the wooded area while Ruffin followed in his own car. The two were together at the site of Mrs. Hurst's assault and death, at the convenience store where their actions drew suspicions, and when they fled in the stolen car. These circumstances were sufficient to convince the jury that the criminal acts were the result of a common scheme.

These facts support the jury's conclusion that, even if Hall did not pull the trigger, he was a principal to the crime of murder. Section 777.011, Florida Statutes (1977), states that

> (w)hoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he is or is not actually or constructively present at the commission of such offense.

An aider and abettor is responsible for all acts committed by his accomplice in furtherance of the criminal scheme. *Foxworth v. State*, 267 So.2d 647 (Fla.1972), *cert. denied*, 411 U.S. 987, 93 S.Ct. 2276, 36 L.Ed.2d 965 (1973); *Pope v. State*, 84 Fla. 428, 94 So. 865 (1922). The evidence in this case shows that either Hall or Ruffin killed Mrs. Hurst. It also demonstrates that the other was an aider and abettor. There is sufficient evidence to sustain Hall's conviction.

Hall next contends that the trial judge should have granted a mistrial because the prosecutor made inflammatory remarks to the jury and commented on

Hall's refusal to testify. It is reversible error for the state to comment on the defendant's failure to testify, *Doyle v. Ohio*, [1324] 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); *Clark v. State*, 363 So.2d 331 (Fla.1978), but the prosecutor did not do so in the instant case. The state did comment (referring to the defendant), "and he's asleep." This was not a comment on Hall's failure to testify. While this remark may have improperly implied a lack of interest on the part of the defendant in his own trial proceedings, it was not so prejudicial that a mistrial was required. We have reviewed the other remarks complained of and find no reversible error.

Hall also complains that a state witness improperly testified that Hall exercised his right to remain silent after being given his Miranda[2] warning.[3] We interpret

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[2] 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[3] The state's witness, Detective White, testified as follows:

Q What did you do then?

A Okay, Trooper Peters handed me his handcuffs and while (Hall) was on the ground I approached him from the rear and cuffed his hands behind his back. And at that time I bent him over, he was still on his knees with his feet on the ground, and I bent him over at the waist, and stood over him and advised him of his rights.

Q When you advised him of his rights, will you tell the ladies and gentlemen of the jury, please, what you told him at that time?

A I told him that he had the right to remain silent, that anything he said could and would be used against him in a court of law. I told him he had the right to an attorney if he wished one, and that if he could not afford one, the court would appoint one for him.

that witness's testimony differently and find that he made no improper comment. While a prosecutor may not elicit from a witness the fact that the accused chose not to make a statement, it is not improper to elicit testimony that Miranda warnings were given to the accused. *See Holland v. State*, 340 So.2d 931 (Fla. 4th DCA 1976). Such testimony is relevant to prove that a subsequent statement was made voluntarily.

Hall's last attack on his conviction is that evidence of the Coburn murder should not have been admitted. He contends that the testimony about Coburn's death was not necessary to the state's case and that the Coburn murder became the feature of the trial. As we did in the case of his cohort, Mack Ruffin, we find that the collateral crime evidence did not become a feature of this trial and that to be admissible the collateral crime evidence need not be necessary to the state's case. *See Ruffin v. State*, 397 So.2d 277 (Fla.1980). As in Ruffin,

---

Q All right. Did he do anything to indicate whether or not he understood what you were saying to him?

A He said he did, or he indicated that he did.

Q In what way did he indicate he understood?

A I don't recall; he said, "Yeah," or something like that.

Q All right. Will you describe, please, the lighting and weather conditions at the time?

A It was fairly chilly. It was pretty cold. It was clear, it wasn't raining. The only light that I recall having at the time was the light from the Lykes-Pasco Packing Company.

Q How was the person dressed?

A He had on a pair of dark checked slacks, and no shirt and no shoes.

the instant collateral crime evidence was admissible to prove identity (the Hurst murder weapon was found under Coburn's body) and to show the general context in which the criminal action occurred. *See Smith v. State*, 365 So.2d 704 (Fla.1978), *cert. denied*, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979).

Hall challenges his death sentence by claiming that the trial court failed to consider that he was under the influence of drugs at the time of the murder, that the prosecutor made improper remarks during the sentencing argument,[4] and that the evidence against Hall was not conclusive. As to the first point, Hall refers to his own testimony:

> A (Hall) I was high when this taken place, I wasn't drunk, I was high, and I'm sorry to say I really didn't want no one to get killed in this case, but it happened this way. I'm sorry it happened that way.

[1325]

> A That's right. All right, also, if I had been ... I was high, like I said, they had it in the paper, we had been smoking some dope and drunk some beer and bought a pint of brandy.
>
> Q So you had been smoking dope?
>
> A Right, that night.
>
> Q What kind of dope were you smoking?
>
> A Some kind of pot, grass.

---

[4] None of the prosecutor's remarks were objected to at the time.

Q And some pills, what kind of pills were you taking?

A I got some the pills from Ruffin.

Hall says that this testimony shows mitigating factors of diminished capacity to appreciate the criminality of his conduct and influence of extreme emotional disturbance. *See* § 921.141(6)(b) and (f), Fla.Stat. (1977). Hall, however, never argued those mitigating factors to the trial court. Even if he had, the trial court could have reasonably found that this testimony did not establish those mitigating factors.

The trial court properly found three aggravating factors beyond a reasonable doubt: the defendant previously had been convicted of another capital crime or of a felony involving the threat of violence to some person; the murder was committed during the commission of kidnapping and robbery; and the murder was especially heinous, atrocious, or cruel. These findings, coupled with the lack of mitigating circumstances, warranted the trial judge's imposition of the death penalty.

We affirm Hall's conviction and death sentence.

It is so ordered.

SUNDBERG, C. J., and ADKINS, BOYD, OVERTON, ENGLAND, ALDERMAN and McDONALD, JJ., concur.

SUPREME COURT OF FLORIDA

No. 73029

FREDDIE LEE HALL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

March 9, 1989

[541 So. 2d 1125]

* * *

[1125]

PER CURIAM.

Freddie Lee Hall, a prisoner under sentence of death and death warrant, appeals the denial of his motion to vacate his sentence pursuant to rule 3.850 of the Florida Rules of Criminal Procedure. Hall also petitions this Court for a stay of execution. We have jurisdiction. Art. V, § 3(b)(1), Fla.Const. After oral argument we stayed Hall's execution, with an opinion to follow. We now reverse the trial court's order, vacate Hall's sentence, and direct the trial court to conduct a new sentencing proceeding before a jury. We also direct that this proceeding be held within ninety days from the filing of this opinion.

Hall and accomplice Mack Ruffin were convicted of the February 1978 abduction and murder of a young woman and sentenced to die in the electric chair. This

Court affirmed Hall's conviction and sen- [1126] tence, *Hall v. State*, 403 So.2d 1321 (Fla.1981) (*Hall I*). In September of 1982 a death warrant was signed, scheduling Hall for execution. This Court affirmed the trial court's denial of Hall's rule 3.850 motion, as well as Hall's petition for a writ of habeas corpus. *Hall v. State*, 420 So.2d 872 (Fla.1982) (*Hall II*). The United States District Court for the Middle District of Florida granted a stay of execution, but eventually denied relief. *Hall v. Wainwright*, 565 F.Supp. 1222 (M.D.Fla.1983) (*Hall III*). The eleventh circuit affirmed in part and reversed in part the district court's decision and remanded the case for a new hearing. *Hall v. Wainwright*, 733 F.2d 766 (11th Cir.1984), *cert. denied*, 471 U.S. 1107, 105 S.Ct. 2344, 85 L.Ed.2d 858 (1985) (*Hall IV*). The district court again denied relief and the eleventh circuit affirmed. *Hall v. Wainwright*, 805 F.2d 945 (11th Cir.1986), *cert. denied*, 484 U.S. 905, 108 S.Ct. 248, 98 L.Ed.2d 206 (1987) (*Hall V*). Hall then petitioned this Court for a writ of habeas corpus based on allegations that the sentencing proceeding violated the United States Supreme Court's ruling in *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). We held that any error in the sentencing proceeding was harmless. *Hall v. Dugger*, 531 So.2d 76 (Fla.1988) (*Hall VI*).

The governor recently signed Hall's second death warrant, scheduling execution for September 20, 1988. Hall filed this, his second rule 3.850 motion with the trial court, alleging, *inter alia*, that his sentencing proceeding was fundamentally flawed under the *Hitchcock* ruling.[1] We do not agree with the trial court's ruling

---

[1] Hall also raises the following issues: (1) violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); (2)

that our denial of relief in *Hall VI*, constitutes a procedural bar under the law of the case and res judicata. This case involves significant additional non-record facts which were not considered in *Hall VI* because that was a habeas corpus proceeding with no further development of evidence beyond the record. In this case, however, we are aided by the trial court's findings of fact at the rule 3.850 hearing. Moreover, as we have stated on several occasions, *Hitchcock* is a significant change in law, permitting defendants to raise a claim under that case in postconviction proceedings. *Cooper v. Dugger*, 526 So.2d 900 (Fla.1988); *Thompson v. Dugger*, 515 So.2d 173 (Fla.1987), *cert. denied*, 485 U.S. 960, 108 S.Ct. 1224, 99 L.Ed.2d 424 (1988); *McCrae v. State*, 510 So.2d 874 (Fla.1987); *Downs v. Dugger*, 514 So.2d 1069 (Fla.1987).

Turning to the merits of Hall's *Hitchcock* claim, we agree that the trial court limited the jury's and its own consideration to the statutorily enumerated mitigating circumstances. *Hall VI*. Furthermore, it is clear from the record that the trial court's express orders in Hall's trial and his accomplice's trial effectively precluded Hall's counsel from investigating, developing, and pre-

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failure of the judge and jury to consider that Hall was brain damaged; (3) violation of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985); (4) the aggravating circumstance of heinous, atrocious, or cruel is unconstitutional under *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); (5) the trial court erroneously instructed the jury that seven votes were needed to recommend life imprisonment; and (6) the sentencing instructions improperly shifted the burden of proof in violation of *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). The trial court correctly determined that these issues could have and should have been raised on direct appeal or in prior motions for postconviction relief. Accordingly, they are procedurally barred at this stage of the proceedings.

senting possible nonstatutory mitigating circumstances. Because *Hitchcock* error has occurred, we must determine whether that error was harmless. *Delap v. Dugger*, 513 So.2d 659 (Fla.1987).

We believe it is necessary at this point to delineate the nonstatutory mitigating evidence proffered by Hall at the rule 3.850 hearing below. Affidavits presented by Hall's counsel from experts and nonexperts tend to prove numerous nonstatutory mitigating factors.[2] First, Dr. George Bar- [1127] nard, the expert appointed to determine Hall's sanity and competency to stand trial, stated that although he found Hall to be competent to proceed with the trial, he was not consulted as to whether Hall's condition met the criteria for the finding of a nonstatutory mitigating circumstance.[3] He further stated that there existed substantial evidence of Hall's long history of drug and alcohol abuse, child abuse amounting to torture, organic brain damage possibly resulting from severe, repeated head trauma suffered as a child and adolescent, and a very low intellectual level.

Dr. Jethro Toomer, a psychologist, professor, and diplomate of the American Board of Professional Psychology examined Hall extensively and concluded that Hall suffered from extreme mental and emotional disturbance, compounded significantly by substance abuse

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[2] The trial court below found that the proffered affidavits, reports, statements, and other evidence proved the alleged nonstatutory mitigating circumstances by a preponderance of the evidence.

[3] As stated, the trial court's specific rulings foreclosed the possibility of investigating, developing, and presenting nonstatutory mitigating evidence. Therefore, counsel cannot be faulted for failure to consult with Dr. Barnard.

throughout his life and at the time of the offense. Dr. Toomer determined that Hall suffered from organic brain dysfunction, including severe impairment of cognitive functions, caused possibly by repeated head trauma. Neuropsychological testing revealed serious brain impairment with moderately abnormal neurometric EEG results, while psychoeducational testing showed Hall to be an illiterate adult.

Dr. Dorothy Lewis, a psychiatrist and professor of Psychiatry at the New York University School of Medicine, evaluated Hall and concluded that he is chronically psychotic, brain damaged, and has severe learning disabilities which are compounded by Hall's use of drugs and alcohol. Dr. Lewis further stated that violent child abuse, organic brain damage, paranoia, and continued substance abuse all contributed to Hall's conduct at the time of the murder. Finally, psychologist Marilyn Feldman examined Hall in conjunction with Dr. Lewis and stated that the results of her testing were consistent with a schizophrenic disorder. Ms. Feldman found that Hall suffers from limited intelligence, organic brain damage, extreme impairment of personality integration, psychotic disorganization, and possible schizophrenia. All of this expert evidence could weigh very heavily in Hall's favor at a properly conducted sentencing hearing.

Just as compelling is the nonexpert evidence of nonstatutory mitigating circumstances. Affidavits from some of Hall's sixteen brothers and sisters paint a stark portrait of a childhood filled with abject poverty, constant violence, and unbearable brutality. Born the sixteenth of seventeen children to a mother and father who fought ceaselessly with shotguns, knives, or whatever weapons were available, Hall's childhood was marked by an existence which can only

be described as pitiful. Teachers and siblings alike immediately recognized him to be significantly mentally retarded. This retardation did not garner any sympathy from his mother, but rather caused much scorn to befall him. Constantly beaten because he was "slow" or because he made simple mistakes, Hall felt the wrath of his father, his mother and his neighbors, who had his mother's permission to beat Hall whenever they deemed it proper. Hall's mother would strap him to his bed at night, with a rope thrown over a rafter. In the morning, she would awaken Hall by hoisting him up and whipping him with a belt, rope, or chord.

Violence of this sort was a regular part of Hall's life as a child. Two of his siblings were murdered while Hall was young, while another brother was tied to a tree with a fire set underneath him.

Hall and his brothers and sisters were required by their mother to work in the fields from the time they could walk. During harvesting seasons, Hall would be kept out of school to work. When his school grades suffered as a result of this, he was further beaten severely.

Furthermore, there is substantial evidence that Hall's mother may have been insane, always believing that a famine was imminent requiring the rationing of their food supplies. As a result, Hall and his [1128] brothers and sisters would work fourteen hours a day in the fields and come home to empty dinner plates. In addition to this delusion, there is evidence that Hall's mother was extremely superstitious, believing and encouraging Hall when he reported to her that he saw spirits and ghosts, hallucinations that have continued to plague Hall throughout his life. These observations and

assessments of Hall's family background are corroborated and supported by documents and observations of professionals who dealt with him.

All of this expert and lay evidence proves or tends to prove a host of nonstatutory mitigating circumstances. We cannot say beyond a reasonable doubt that the three aggravating circumstances found at Hall's original sentencing proceeding would have outweighed all of this. Therefore, the *Hitchcock* error cannot be considered harmless. It is of no significance that the trial judge stated that he would have imposed the death penalty in any event. The proper standard is whether a jury recommending life imprisonment would have a reasonable basis for that recommendation. If so, the trial judge could not override the jury's recommendation and sentence Hall to death. *Tedder v. State*, 322 So.2d 908 (Fla.1975). Here, there is clearly such a basis. In light of the substantial mitigating evidence, it would be a remarkable exercise in speculation to conclude that the three aggravating circumstances, beyond a reasonable doubt, outweigh this evidence in mitigation. Accordingly, we vacate Hall's death sentence and remand for the trial court to empanel a new jury and conduct a new sentencing proceeding, during which Hall may present his newly developed mitigating evidence.

A few words are in order about how *Hitchcock* claims should be raised. *Hitchcock* is of recent origin. Due to the number of death row inmates who have raised *Hitchcock* claims, many under the time constraints of a pending death warrant, we have been lenient in entertaining the claim, whether made through habeas corpus or rule 3.850 postconviction relief proceedings. Appellate courts are reviewing, not fact-finding, courts. We hold, therefore, that *Hitchcock*

claims should be presented to the trial court in a rule 3.850 motion for postconviction relief and that, after the filing of this opinion, such claims will not be cognizable in habeas corpus proceedings.[4] *Stewart v. Wainwright*, 494 So.2d 489 (Fla.1986).

It is so ordered.

EHRLICH, C.J., and SHAW, BARKETT and KOGAN, JJ., concur.

McDONALD, J., dissents with an opinion, in which OVERTON, J., concurs.

GRIMES, J., dissents with an opinion.

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[4] If, when this opinion is filed, inmates under pending death warrants have filed habeas corpus petitions seeking relief under *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), we will consider those petitions. All *Hitchcock* claims raised after this opinion is filed, however, must be presented in a rule 3.850 motion for postconviction relief filed with the trial court.

McDONALD, Justice, dissenting.

It is inconceivable to me that a *Hitchcock*[1] error affected the jury's recommendation in this case. Even if the nonstatutory mitigating evidence now sought to be introduced had been presented and the jury had been specifically told it should consider it in the weighing process, when compared with the circumstances of the crime for which Hall stands convicted, and his character as demonstrated by his past and present criminal conduct, I am convinced beyond a reasonable doubt that the outcome would be the same. The trial judge has stated that he would have imposed the death penalty had the omitted nonstatutory evidence been presented. I strongly suspect that in this case a jury override would have been upheld.

Hall was thirty-three years old when this murder was committed. He had a prior conviction and had served prison time for [1129] the crime of rape. When sentenced for this crime, he had also been convicted of the murder of Deputy Coburn, which occurred a few hours after this homicide. The victim in this case was a seven-month pregnant woman who had been abducted from a shopping center, taken into the woods, beaten, robbed, raped, and shot. Under these facts, I perceive no grounds for sympathy for Hall despite the fact that he may have presented evidence of organic brain damage, abused childhood, low intelligence, deprived life, and alcohol and drug abuse. Were he younger and had no prior record, these factors may have been more significant, but even then, when considering the circumstances of this crime and the slaying of a peace officer

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[1] *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987).

on the same day, I do not believe that it would make a difference. I agree entirely with the trial judge that any *Hitchcock* or *Lockett*[2] error was harmless beyond a reasonable doubt.[3]

Although I am comfortable with applying the *Chapman*[4] test of harmless error in this case, I have some residual doubt that we should have to. In post-conviction proceedings, for whatever reason, it would appear that the *Strickland*[5] test should be applied, i.e., the burden should be on the petitioner to demonstrate both error and *that the error would likely affect the outcome of the proceeding*. This is the test employed in ineffective assistance of counsel claims. We have seemingly shifted the burden on the second prong in *Hitchcock*-related claims to the state. I think the burden should be on Hall to show that the error would likely have affected the outcome. But in any event, as I have previously stated, in applying *Chapman* I am satisfied that any error in this case was harmless beyond a reasonable doubt.

I agree that in the future all *Hitchcock* claims should proceed solely by way of a Florida Rule of Criminal Procedure 3.850 proceeding.

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[2] *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

[3] The judge who heard this motion presided at Hall's trial. His findings on this issue are entitled to considerable weight. *See Francis v. State*, 529 So.2d 670 (Fla.1988).

[4] *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

[5] *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

OVERTON, J., concurs.

GRIMES, J., dissenting.

I agree with Justice McDonald's analysis that on the facts of this case any violation of the rule of *Hitchcock v. Dugger*, 107 S.Ct. 1821 (1987), was harmless beyond a reasonable doubt.

IN THE CIRCUIT COURT OF THE
FIFTH JUDICIAL CIRCUIT OF THE STATE
OF FLORIDA, IN AND FOR SUMTER COUNTY

No. 78-52-CF

STATE OF FLORIDA

v.

FREDDIE LEE HALL

[stamp illegible]

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[1]

FINDINGS OF FACT FOR SENTENCING ORDER

THIS CAUSE coming on to be heard upon a Remand for a new sentencing phase proceeding as required by the Supreme Court on March 9, 1969, in *Hall v. State*, 541 So.2d 1125, and this Court having held a six-day sentencing phase proceeding in Ocala, Marion County, commencing December 10, 1990, and at the conclusion of said sentencing phase the jury by a vote of 8-4 having recommended the death penalty, and the undersigned being the judge who had conducted the Sentencing Phase Proceeding, having reviewed the sentencing memoranda of law submitted by each side, having considered the matters submitted by the defense for the taking of judicial notice, having given this matter considerable deliberation, and being otherwise advised in the premises, the Court submits the following:

SUMMARY OF THE FACTS OF THE CASE

The following factual synopsis is taken directly from the Florida Supreme Court Opinion, *Hall v. State*, 403 So.2d 1321 (Fla. 1981), which affirmed Hall's previous conviction and previous sentence of death.

The synopsis is not intended to be a thorough explanation of the facts of this case, but is intended [2] to give a factually neutral, thumbnail sketch of same to begin the analysis of this cause. Because of its brevity, this summary is necessarily sterile and antiseptic, and does not accurately reflect the true horrors of this case.

> "On February 21, 1978, Mrs. Hurst a 21 year-old housewife who was seven months pregnant, left a Pantry Pride checkout counter in Leesburg, Florida, at 3:00 p.m. Her body was found at 3:00 p.m. on February 22, 1978, in Sumter County. She had been shot and sexually assaulted. In custody on the morning of February 22, for Deputy Coburn's death, Hall told a deputy sheriff how, on the previous day, he and Ruffin had sat in the Pantry Pride parking lot looking for a car to use in committing a robbery when he, Hall, accosted Mrs. Hurst and forced her into her car. Hall slid in behind the steering wheel and drove while Ruffin followed in his own car. They stopped in a wooded area where, according to Hall, Ruffin beat, sexually assaulted, and shot Mrs. Hurst.
>
> "At trial the evidence established that, after leaving the wooded area, the pair was seen at a convenience store in Hernando County. Their conduct in the store aroused suspicions and the clerk called the sheriff's office. Before a deputy arrived, Hall and Ruffin left the store. Shortly

> after their departure the clerk heard a shot and found Deputy Coburn dead on the ground behind the store; Coburn's weapon was missing, but under his body lay the weapon later shown to have killed Mrs. Hurst. Hall and Ruffin fled in the Hurst vehicle, which they had driven to the store; but, after a chase, they abandoned the car and fled on foot. Both men were caught shortly thereafter. They left Coburn's pistol, Mrs. Hurst's handbag, and groceries which she had bought that afternoon in the car."

The above synopsis is totally consistent with the recollection of the undersigned as resentencing judge in this case, and his recent review of his trial notes and the memoranda of law.

HISTORY OF THE CASE

Defendant's Motion for Change of Venue was granted, and trial of this cause was moved from Sumter County to [3] Putnam County. Trial was held in that county, and the jury found him guilty of first degree murder, and recommended by its "advisory" sentence that the death sentence be imposed. A Finding of Fact relative to the imposition of the death sentence was made, which found that the aggravating circumstances outweighed the mitigating circumstances. A sentence of death was imposed on June 27, 1978, which was affirmed by the Florida Supreme Court, *Hall v. State*, 403 So.2d 1321 (Fla. 1981)

Defendant's first Motion to Vacate was filed on the 30th day of September, 1982, and denied; and that ruling was affirmed by the Florida Supreme court in *Hall v. State*, 420 So.2d 872 (Fla. 1983). On petition for a writ of habeas corpus the federal district court denied relief. *Hall v. Wainwright*, 565 F.Supp. 1222 (M.D. Fla.

1983). The eleventh circuit affirmed in part and reversed in part the district court's decision and remanded for a hearing. *Hall v. Wainwright*, 733 F.2d 766 (11th Cir. 1984), *cert denied*, 471 U.S. 1107 (1985). On remand the district court denied relief, and the circuit court affirmed. *Hall v. Wainwright*, 805 F.2d 945 (1986). Defendant then sought certiorari review in the United States Supreme court based on *Hitchcock v. Dugger*, 197 S.Ct. 1821 (1987), which that Court denied. *Hall v. Dugger*, 108 S.Ct. 248 (1987). The Florida Supreme Court denied defendant's petition for habeas corpus in *Hall v. Dugger*, 531 So.2d 71 (Fla. 1988), where he sought a new sentencing proceeding. In said case the Florida Supreme Court ruled that the presiding judge, Judge John W. Booth, during the 1978 trial of defendant, limited his consideration, and that of the jury, to statutorily enumerated mitigating circumstances (the then existing law in Florida) but such limitation was harmless error beyond a reasonable doubt, and defendant was therefore not entitled to a new sentencing proceeding; and on August 11, 1988, the Honorable Bob Martinez, Governor of the State of Florida, signed a death warrant directing that the [4] sentence of death be executed upon defendant on some day of the week between September 19, 1988, and September 26, 1988.

Defendant filed various motions herein, including his second and third motions to vacate, all seeking that the death sentence be vacated and set aside; and after numerous hearings and carefully reviewing and considering defendant's proffer of evidence showing or tending to support mitigating evidence not considered by the Court or jury in the 1978 jury trial, Judge Booth denied defendant's motions and ratified and affirmed the 1978 death sentence based on eight "Findings" con-

tained in the Order entered in this cause on September 9, 1988.

On March 9, 1989, the Florida Supreme Court in *Hall v. State*, 541 So.2d 1125, reversed (with Justices McDonald, Overton and Grimes dissenting with opinions) the above September 9, 1988, Order of this Court, and directed a new sentence proceeding before a jury within ninety days from date of that opinion,

On July 5, 1989, in a strongly-worded Order again expressing his unwaivering opinion that "the only proper disposition herein is for the execution of the Death Sentence originally imposed upon the defendant," Judge Booth disqualified himself from further participation in the case. Judge Swigert, Chief Judge of the Fifth Judicial Circuit appointed the undersigned to handle said case through resentencing.

On December 10, 1990, in Ocala, Marion County, Florida (after numerous delays and continuances necessary to get all parties and the court properly "focused" on this case), the resentencing trial of the defendant began. Said resentencing had been moved to Ocala as a result of a Motion for Change of Venue filed by the defendant on October 15, 1990. After a six (6) day trial, the jury, by a vote of 8-4, brought back a verdict of death. After reviewing sentencing memoranda submitted by counsel for each side, [5] this cause is now set for sentencing on February 21, 1991, in Bushnell, Sumter County, Florida.

DISCUSSION OF THE AGGRAVATING CIRCUMSTANCES

This Court specifically finds that The State of Florida has proven, beyond and to the exclusion of any rea-

sonable doubt, the existence of the following aggravating circumstances pursuant to Florida Statute 921.141:

(1) *The defendant was previously convicted of a felony involving the use or threat of violence to the person.*

(a) The July 19, 1968, conviction of Assault with Intent to Commit Rape of Thelma Freelove.

(b) The June 1, 1978, conviction of Murder in the death of Hernando County Deputy Sheriff Lonnie Coburn.

(c) The October 30, 1978, conviction of shooting at, or into the Occupied Motor Vehicle of Pasco County Deputy Sheriff Michael James.

Certified copies of the said convictions were offered and accepted as evidence herein.

(2) *The capital felony was committed by a person under sentence of imprisonment.*

The evidence is clear, and unrefuted, that at the time of the murder of Karol Lea Hurst the defendant was on parole for the offense of Assault with Intent to Commit Rape.

See, Michael v. State, 437 So.2d 138 (Fla. 1983); *Brown v. State*, 473 So.2d 1260 (Fla. 1985); *Mills v. State*, 476 So.2d 172 (Fla. 1985).

(3) *The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of a Kidnapping or Sexual Battery.*

The defendant admitted his involvement in the abduction of Karol Hurst in his testimony during the original trial, the transcript of which was read into evidence herein. *See, Hall v. State*, 403 So.2d 1321 (Fla. 1981).

[6] The record similarly demonstrated beyond a reasonable doubt that the defendant committed sexual battery on Karol Hurst immediately prior to taking her life. Despite the defendant's claims of nonparticipation, the evidence clearly shows that:

(a) The victim had sexual intercourse at or immediately prior to the time of her death. (Testimony of Dr. William Shutze.)

(b) Semen was present in several locations, on the victim's panties. The said semen was consistent with the blood type of the defendant. As between the defendant, the codefendant, and the victim's husband, the defendant was the only possible source of at least a portion of the said semen. (Testimony of Dr. William Shutze and Roger Morrison.)

(c) The codefendant indicated, consistent with the physical evidence, that both he and the defendant had raped Karol Lea Hurst. (Testimony of Arthur Freeman.)

(4) *The capital felony was committed for pecuniary gain.*

One of the primary motivations for the murder of Karol Lea Hurst was to obtain a vehicle, to be used instead of the codefendant's vehicle so as to frustrate identification and as a step in the furtherance of the sought-after financial gain expected to be derived from the robbery of the convenience store in Hernando County. The record clearly demonstrated that Karol Lea Hurst was murdered for her vehicle. *Cf, Rogers v. State*, 511 So.2d 526 (Fla. 1987); *Scull v. State*, 533 So.2d 1137 (Fla. 1988).

(5) *The capital felony was especially heinous, atrocious or cruel. See, Hall v. State,* 403 So.2d 1321 (Fla. 1981).

The facts of this case speak for themselves. (See "Summary of the Facts," discussion under next aggravating circumstances, and discussion *infra.*). There is no doubt in this Court's mind that under the unusual circumstances [7] of this case, considering the totality of the facts herein, that this murder was especially heinous, atrocious and cruel.

(6) *The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.*

(a) The evidence demonstrates the defendant abducted Karol Lea Hurst from a public location in Lake County, Florida, and took her to a hidden, isolated location in Sumter County, Florida. Once at the murder site, the defendant raped Karol Lea Hurst then took her some 60 feet further into a wooded, secluded area, clearly evidencing a fully developed premeditation to kill.

(b) The evidence clearly demonstrates that there in the deep, hidden woods, Karol Lea Hurst alternately bargained for and begged for her life; once offering the defendant a blank check; then pleading that her life and the life of her unborn child be spared. Such bargains and pleas could fail to dissuade only an already fixed, unmovable, premeditated intent.

(c) The evidence clearly demonstrates that then Karol Lea Hurst was murdered: the initial effort consisting of raining down strong blows on the back of her neck with a pistol barrel or butt; and then, with Karol

Lea Hurst in a huddled, defensive position, she was shot, execution-style, in the back of the head at close range. *See, Stano v. State*, 460 So.2d 890 (Fla. 1984); *Parker v. State*, 476 So.2d 134 (Fla. 1985); *Harvey v. State*, 529 So.2d 1083 (Fla. 1988); *Knight v. State*, 512 So.2d 922 (Fla. 1987).

Under the totality of the circumstance in this cause, it is this Court's conclusion, beyond and to the exclusion of every reasonable doubt, that the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

[8] (7) *The capital felony was committed for the purpose of avoiding or preventing a lawful arrest.*

(a) The evidence clearly demonstrates the defendant discussed with his codefendant the benefits to be derived from witness elimination by the killing of Karol Lea Hurst obviously she, once dead, could not call them to account for her abduction and rape.

(b) The evidence clearly leaves no reasonable inference but that Karol Lea Hurst was abducted and transported some distance to a secluded area for the sole purpose of killing her, thereby eliminating the only witness to her abduction, rape and, equally significant the theft of, and subsequent criminal use of, her vehicle in the planned robbery of the convenience store.

See, Johnson v. State, 442 So.2d 185 (Fla. 1983); *Cave v. State*, 476 So.2d 180 (Fla. 1985); *Swafford v. State*, 533 So.2d 270 (Fla. 1988); *Lopez v. State*, 536 So.2d 226 (Fla. 1988).

STATUTORY MITIGATING CIRCUMSTANCES

The defense attempted to present evidence purporting to establish the following statutory mitigating factors:

(1) *The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.*

(2) *The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.*

(3) *The defendant was an accomplice in a capital felony committed by another person and his participation was relatively minor.*

(4) *The age of the defendant at the time of the crime.*

[Here, the defendant attempted to argue his "mental age," based on the alleged mental, emotional and learning deficiencies , should be considered, rather than his chronological age.]

[9]

NON-STATUTORY MITIGATING CIRCUMSTANCES

In addition to the above four statutory mitigating circumstances, the defense attempted to present evidence purporting to establish the following nonstatutory mitigating circumstances, among the myriad of potential mitigating circumstances which were attempted to be developed during the course of the trial by the defense:

(a) Freddie Lee Hall suffers from organic brain damage.

(b) Freddie Lee Hall has been mentally retarded all of his life.

(c) Freddie Lee Hall suffers chronic mental illness/psychosis and has suffered from same throughout his life.

(d) Freddie Lee Hall suffered tremendous emotional deprivation and disturbance throughout his life.

(e) Freddie Lee Hall received no assistance from anyone to deal with his problems.

(f) Freddie Lee Hall suffered tremendous physical abuse and torture as a child.

(g) In addition to the abuse at the hands of his mother, Freddie Lee Hall suffered physical abuse at the hands of his brothers and sisters who, because of their own ages and circumstances, did not recognize their contributions to his problems. The family was disruptive and dysfunctional.

(h) Neighbors, at the encouragement of Mrs. Hall (the defendant's mother), abused Freddie.

(i) Throughout his life Freddie Lee Hall was constantly exposed to violence.

(j) Freddie Lee Hall was reared in a setting which, rather than treated his mental dysfunctions, encouraged them.

[10] (k) Freddie Lee Hall, one of seventeen children, was raised under conditions of extreme poverty and deprivation.

(l) Freddie Lee Hall suffered from a distinct speech defect which contributed to his inability to communicate and had tremendous influence on his personal development.

(m) Freddie Lee Hall suffers from learning disabilities.

(n) Freddie Lee Hall is illiterate.

(o) Freddie Lee Hall was unable to cope and in large measure isolated himself from others.

(p) Freddie Lee Hall had no positive role models in his life.

(q) At the time of this offense Freddie Lee Hall's judgment was impaired by the long-term use of alcohol and drugs.

(r) Freddie Lee Hall's personality development was extremely low.

(s) Freddie Lee Hall did not calculate or plan Mrs. Hurst's murder.

(t) Mack Ruffin, Jr., the person who in the course of events on February 21, 1978, shot at and attempted to kill Deputy Michael James, received a life sentence for this homicide.

(u) Freddie Lee Hall cooperated with law enforcement and assisted in the investigation.

(v) Freddie Lee Hall is genuinely contrite and remorseful for his involvement in the events of February 21, 1978.

(w) Freddie Lee Hall attempted to dissuade Mack Ruffin, Jr., from killing and beating Mrs. Hurst.

(x) Mack Ruffin, Jr., the codefendant and only one tried and convicted for Mrs. Hurst's sexual battery, received a life sentence for her death.

(y) Mack Ruffin, Jr., the actual killer of Karol Lea Hurst, received a life sentence for her death.

[11] (z) The defendant had alcoholic parents.

(aa) The defendant's mother may have been mentally ill.

PRELIMINARY COMMENT ON THE MITIGATING CIRCUMSTANCES

The defense went to great lengths in presenting copious testimony regarding the defendant's childhood, personal history, educational achievements or lack thereof, and mental and emotional status. Several problems presented themselves to the Court throughout all this rather uncontradicted testimony:

(1) No one could positively relate any alleged deficiencies back to the date of the crime at issue, as all of the mental and psychological exams had been conducted some eight (8) years or more after the murder of Karol Lea Hurst.

(2) No one could say positively that the various alleged mitigating factors actually had an effect on the defendant at the time of the crime at issue even though all experts agreed that they had the potential to affect Freddie Lee Hall at the time of the crime at issue.

(3) Experts are legally entitled to form opinions. Nevertheless, the opinions of experts are subject to being believed or disbelieved by the trier of fact. Psychology and psychiatry are still frontier sciences subject to much speculation and conjecture. Trying to surmise as to a defendant's state of mind eight to ten years earlier, based on an exam given that long after the crime, is scientific guesswork, at best.

(4) The term "Mitigating Circumstance" (at least as to nonstatutory mitigating circumstances) to the undersigned is a two-pronged test: "Mitigating Circumstance" means:

1. That the circumstance is reasonably proved by the evidence, and

[12] 2. That such circumstance has proved that it is at least potentially "mitigating"; that is, that such factor has been found by the preponderance or greater weight of the evidence to be a reason why the defendant should be considered less culpable for his part in the alleged crime. For my considerations herein, statutory mitigating factors will be treated as "mitigating" per se, and the only requirement will be that their mere existence be proved by the greater weight of the evidence. *See, Rogers v. State*, 511 So.2d 526 (Fla. 1987), *cert denied*, 484 U.S. 1020 (1988). Thus, for purposes of determining nonstatutory "mitigating circumstances," this Court will require that both prongs of this test (both the existence of the fact and that it reduced moral or legal culpability) have been found by the greater weight of the evidence.

ANALYSIS OF MITIGATING CIRCUMSTANCES

1. *The crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.*

2. *The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.*

The defendant offered the testimony of four expert witnesses on the issue of the defendant's mental condition. Collectively, Doctors Lewis, Bard, Toomer, and Heide opined that the defendant suffered from numerous maladies, including: chronic psychosis, mental retardation, brain damage, learning disability, speech impediment, and drug and alcohol abuse. All of the witnesses further opined that the said defects were of

long standing and would have been affecting the defendant at the time of the offense. However, the record before the Court clearly demonstrates that the opinions of the defendant's experts are of little or no utility in determining the *actual mental status of* [13] *the defendant at the time of the offense*, and further, that the said opinions are inherently speculative. This issue of whether or not the defendant is psychotic or otherwise mentally impaired is relevant to the above-said statutory mitigating circumstances only if the psychosis or the mental condition was present and active at the time of the crime. The undisputed fact is that the earliest that was any one of the defense experts examined the defendant some eight years after the murder of Karol Lea Hurst (Dr. Lewis—September 10, 1986; Dr. Toomer—August 18, 1988; Dr. Heide—September 7, 1990; Dr. Bard—September 1986). Each of them claims that the mental conditions they noted in the defendant at the time of their evaluation would have been present on February 21, 1978, the day of the offense. Dr. Lewis asserts this position despite the fact that she did not discuss the circumstances of the offense with the defendant and could not recall whether she had any independent knowledge of those circumstances at the time of her interview. Dr. Toomer suggests that his testing materials and observations would be indicative of behavior more than ten years prior to his interview despite the fact that he, as well, failed to explain how the defendant's alleged mental deficiencies in August of 1988 affected the defendant's active participation in the kidnapping, rape and murder of Karol Hurst on February 21, 1978. Dr. Heide, the criminologist, agrees with the opinions of the psychiatrist and the psychologist, but prefers to mitigate the behavior of the defendant by questioning whether the defendant fired the fatal

shots, intended the death of either of the victims, or participated in the rape of Karol Hurst.

Of more significance in a reasoned analysis of the defendant's mental status at the time of the offense is the comparison of the opinions of the experts retained by the defendant and the opinions of the experts appointed by the Court in the spring of 1978. Dr. Frank Carrera [14] testified that on April 22, 1978, he and Dr. George Barnard conducted psychiatric evaluations of the defendant pursuant to an Order of the Honorable John W. Booth, Circuit Judge, to determine the defendant's trial competency and his sanity at the time of the crime. Dr. Carrera testified that at the time of his evaluation, approximately eight weeks after the murder of Karol Lea Hurst, he saw no indication of any psychosis on the part of the defendant, and further that he saw no indication of any significant past history of psychosis or other mental illness. Unlike the chronic history of hallucinations reported by the defendant to his own experts, he told Dr. Carrera of only one instance, ten years prior, of ever experiencing any form of hallucination. Based upon his evaluation of the defendant, Dr. Carrera testified that it was his opinion that Freddie Lee Hall was *not* under the influence of an extreme mental or emotional disturbance at the time of the offense, *nor* was his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law substantially impaired.

The Court is impressed with the qualifications, credibility and sincerity of the expert witnesses presented by the defense. Nevertheless, their testimony all suffers from the same defect in that they cannot positively predict that the defendant was suffering from the various mental anomalies of which they testify at the time of the crime itself, even though they all testify

that they feel confident that the defendant so suffered at the time of the crime. These defense witnesses' assurances though are contradicted by the testimony of Dr. Carrera, a Court-appointed psychiatrist who examined the defendant shortly after the crime at issue. Dr. Carrera found no indication of any psychosis on the part of the defendant. This Court concludes that Dr. Carrera's testimony, based on an examination only a month or so after the crimes for which the defendant was convicted, is entitled to much greater weight than that of the defense experts.

[15] Moreover, the Court suspects that the defense experts are guilty of some professional overkill. If the testimony of the defense experts is believed and taken to its logical conclusion, the defendant is practically a vegetable. However, his behavior at the time of the crimes for which he stands convicted, as well as some of the statements that he made previously (such as his previous testimony at trial), would belie the fact of his severe psychosis and mental retardation. Nothing of which the experts testified could explain how a psychotic, mentally-retarded, brain-damaged, learning-disabled, speech-impaired person could formulate a plan whereby a car was stolen and a convenience store was robbed. Bear in mind that the facts of this case conclusively showed that Freddie Lee Hall was the one that kidnapped Karol Lea Hurst from the Pantry Pride grocery store. Freddie Lee Hall alone was the one that drove Karol Lea Hurst in broad daylight, through the city of Leesburg to a spot in the woods some eighteen miles distant. There is no evidence as to whether or not Freddie Lee Hall possessed a driver's license, but he was certainly driving a car in broad daylight through city traffic with a kidnapped victim inside. Moreover, after the killing of Deputy Coburn at the convenience

store in Ridge Manor, Hernando County, Florida, the evidence is uncontroverted that it was Freddie Lee Hall who was driving the getaway car during a high-speed chase while Mack Ruffin, Jr. was firing at the pursuing deputy. Freddie Lee Hall was able to drive the car in such a manner as to elude the deputy after approximately a five-mile chase and to get the car into an orange grove where he and his codefendant made their escape on foot. On foot they made their way some six to seven miles distance, eluding a massive manhunt, until they were captured in the early morning hours of the following day. Nothing in the evidence can explain how Freddie Lee Hall could live a more or less normal life, obtain employment, and substantially remain [16] outside of violation of the law during the five (5) years that he was on parole after his first rape conviction. Nothing in the evidence can explain the statements that the defendant made when he testified in his own behalf during his first trial. Those statements appear to the Court to be an attempt to place blame on others for his involvement in the crime, but his statements are no different than those made by the "normal" defendant in almost any criminal trial conducted. In other words, the clinical characterization of the defendant presented by the testimony of the defense experts does not seem to comport with the other evidence of the defendant's background and behavior that are clear from other aspects of the evidence in this case. Thus, this Court believes that the evidence of the experts, for whatever reason or reasons, is exaggerated to some extent.

However, this Court does find the evidence conclusively demonstrates that at the time of the crime for which the defendant stands convicted, that he may have been suffering from mental and emotional dis-

turbances and may have been, to some extent, unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

Based on all of the above, this Court is not able to find by even a greater weight of the evidence that the defendant was, at the time of the crime for which he is to be sentenced, under the influence of *extreme mental or emotional disturbance.* The Court does believe that the evidence would indicate that the defendant may have been under the influence of mental or emotional disturbance at the time of the crime, but so are most defendants. Moreover, this Court is not able to determine to what extent such behavior would or should mitigate the culpability of the defendant in this crime.

The Court also finds that there is a lack of evidence to sustain the mitigating factor that the capacity [17] of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was *substantially* impaired. The Court finds that the greater weight of the evidence would support a finding that the defendant may have lacked some ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. However, the Court is not able to determine to what extent the defendant's abilities to appreciate or to conform were impaired. As stated above, the evidence offered by the defense to provide this scientific underpinning must be interpolated in order to get it back eight or more years from the time of the psychiatric exams relied upon by the defense.

There is no doubt, however, that should the testimony of the defense experts be taken purely at face value, then the defendant did lack the capacity to

appreciate the criminality of his conduct or to conform his conduct to the requirements of law and was substantially impaired at the time of the crime for which he stands convicted.

3. *The defendant was an accomplice in the offense for which he is to be sentenced, but the offense was committed by another person and the defendant's participation was relatively minor.*

The defendant relies upon his own self-serving statements and a portion of the testimony of Arthur Freeman to suggest that the evidence herein establishes that the codefendant is solely responsible for the murder of Karol Lea Hurst. From his own statements and *all* the testimony of Arthur Freeman, it is abundantly clear that the defendant was a knowing, willing, and active participant in the series of events leading up to and following Karol Lea Hurst's death. The statements of the defendant, considered alone, irrefutably establish that his participation in the crime was anything but minor. The totality of testimony offered by Arthur Freeman, if it is to be considered, supports the proposition that the defendant was the dominant and [18] motivating force behind the killing, and that Mack Ruffin, Jr., if he in fact is the one who actually killed Karol Lea Hurst pulled the trigger only after he was goaded and cajoled into performing the act by the defendant in order to prove to the defendant that he was a "man" and "worthy enough to be his partner.

The defendant should not be permitted to benefit from the fact that only one bullet was fired into Karol Lea Hurst's body, particularly where the evidence supports the proposition that the defendant prevailed upon his codefendant to fire that fatal bullet.

This Court does not find that this statutory mitigating circumstance was met by the greater weight of the evidence.

4. *Freddie Lee Hall's "age" at the time of the offense.* The defense requests the Court to find the defendant's age at the time of the offense as a mitigating factor. At the time of the offense the defendant's age was thirty-three (33). However, the defense requests the Court to look at the defendant's "mental age," not his chronological age.

The Court has considered the request of the defense and finds that even if we reduce the chronological age of the defendant by thirty-three percent (33%) on account of retardation, mental deficits and so forth, the defendant would still have a chronological age of approximately twenty-two at the time of the crime. The Court does not find that the age of the defendant at the time of the crime was a mitigating factor, even considering mental age rather than chronological age. This alleged mitigating circumstances has not been proved by a greater weight of the evidence.

5. *The defense also attempted to provide evidence of various nonstatutory mitigating factors*:

(a) *That the defendant suffered from organic brain damage.*

[19] This fact was uncontroverted in the record, but its mitigating value is unquantifiable.

(b) *Freddie Lee Hall has been mentally retarded his entire life.*

There is substantial evidence in the record to support this finding. Again, however, there is difficulty in relating this factor back to determine how it affected the defendant's state of mind at the time of the crime.

The mitigating factors of this fact are thus unquantifiable.

(c) *Freddie Lee Hall suffers mental illness/psychosis and has suffered from same throughout his life.*

This alleged mitigating circumstance is more controverted in the record. The defense put on numerous experts that clearly indicated that such was true. However, Dr. Carrera testified that he found no psychosis in the defendant when he examined him shortly after the crime for which he stands convicted. The greater weight of the evidence would likely demonstrate some mental illness on behalf of the defendant most likely evident at the time of the crime. However, what mental illness was present and the extent to which it affected the thinking of the defendant at the time of the crime is unquantifiable.

(d) *Freddie Lee Hall suffered tremendous emotional deprivation and disturbance throughout his life.*

The evidence of this fact was overwhelming. Again, however, there is a considerable difficulty in determining how and to what extent this circumstance should be allowed to mitigate the behavior of the defendant. How such a horrible childhood affected the defendant at the time of his childhood is apparently impossible to ascertain. Such factor is thus unquantifiable.

(e) *Freddie Lee Hall received no assistance from anyone to deal with his problems*:

There was no evidence in the record to suggest that defendant did receive, at any time, assistance from [20] anyone for his problems. This factor could contribute to the exacerbation of the defendant's mental

and emotional problems, but in and of itself it is not a mitigating circumstance.

(f) *Freddie Lee Hall suffered tremendous physical abuse and torture as a child.*

The evidence on this alleged mitigating circumstance was overwhelming. The extent to which such abuse and torture affected his state of mind at the time of the crime is unascertainable and thus unquantifiable.

(g) *In addition to the abuse at the hands of his mother, Freddie Lee Hall suffered physical abuse at the hands of his brothers and sisters who, because of their own ages and circumstances, did not recognize their contributions to his problems. The family was disruptive and dysfunctional.*

Same response as in 5(b), *supra*.

(h) *Neighbors at the encouragement of Mrs. Hall abused Freddie Lee Hall.*

The Court's response to this alleged mitigating circumstance is the same as that contained in paragraph (b) above.

(i) *Throughout his life Freddie Lee Hall was constantly exposed to violence.*

The Court's response to this alleged mitigating circumstance is the same as that contained in paragraph (b) above.

(j) *Freddie Lee Hall was reared in a setting which, rather than treating his mental dysfunctions, encouraged them.*

The Court's response to this alleged mitigating circumstance is the same as that contained in paragraph (b) above.

(k) *Freddie Lee Hall, one of seventeen children, was raised under conditions of extreme poverty and deprivation.*

[21] The evidence of this fact was uncontradicted. However, the effect of this fact is impossible to ascertain. Certainly the defense is not arguing that everyone that is raised in the condition of extreme poverty and deprivation has the right to claim that as a mitigating factor if they are charged with a crime. In fact, many are able to rise from such extreme poverty and deprivation and make a substantial contribution to society. One of the witnesses in this case, Roosevelt Johnson, was a neighbor of the defendant during his childhood, and in fact, lived approximately two houses from him. It must be assumed that Roosevelt Johnson was raised in approximately the same form of poverty and deprivation. However, Roosevelt Johnson has been able to complete school, become highly educated, and now is a successful principal of a high school in the southern part of the state. Thus, the Court does not find this factor, standing alone, to be a mitigating factor. As with all of these alleged mitigating factors, its influence, if any, on the defendant is unascertainable.

(l) *Freddie Lee Hall suffered from a distinct speech impediment which contributed to his inability to communicate and had its influence on his personality development.*

The evidence that the defendant suffered from a distinct speech defect is clear from the record. Evidence that the speech defect had an adverse effect on his educational and personality developments is likewise clear from the record. What isn't clear from the record is whether this speech defect in any way should

be utilized to mitigate the defendant's culpability in this crime.

(m) *Freddie Lee Hall suffers from learning disabilities.*

The Court's findings on this alleged mitigating circumstance are the same as those found in the preceding paragraph.

(n) *Freddie Lee Hall is illiterate.*

[22] The Court's findings on this alleged mitigating circumstance are the same as those found in paragraph (b).

(o) *Freddie Lee Hall was unable to cope and in a large measure isolated himself from others.*

The Court's findings on this alleged mitigating circumstance are the same as those found in paragraph (b).

(p) *Freddie Lee Hall had no role models in his life.*

The Court's findings on this alleged mitigating circumstance are the same as those found in paragraph (b).

(q) *At the time of his offense Freddie Lee Hall's judgment was impaired by long-term use of alcohol and drugs.*

There was no positive testimony at the resentencing hearing on this alleged mitigating circumstance. Accordingly, the Court finds that this alleged mitigating circumstance was not met by the greater weight of the evidence.

(r) *Freddie Lee Hall's personality development was extremely low.*

The Court's findings on this alleged mitigating circumstance are the same as those found in paragraph (b).

(s) *Freddie Lee Hall did not calculate or plan Mrs. Hurst's murder.*

The Court does not find from the evidence of this case that, at the time that the defendant kidnapped Mrs. Hurst from the grocery store, he intended to kill her. However, the court does find that during the course of the events later on the afternoon of the crime the defendant formed a preconceived plan that the victim would have to be murdered, and he accomplished that fact either himself, or by encouraging his accomplice to do the evil deed.

(t) *Mack Ruffin, Jr., the person who in the course of events on February 21, 1978, shot at and attempted to kill Deputy Michael James received a life sentence for this homicide.*

[23] This Court finds that Mack Ruffin, Jr., was likely the person who attempted to kill Deputy Michael James, and this Court also finds that Mack Ruffin, Jr., received a life sentence for the homicide of Karol Lea Hurst. This Court does not find that, in and of itself, to be a mitigating circumstance in this cause.

(u) *Freddie Lee Hall cooperated with law enforcement and assisted in the investigation.*

There is some evidence to the effect that this alleged mitigating circumstance is factually correct. The Court does find the defendant's cooperation to be minimally mitigating in this cause.

(v) *Freddie Lee Hall was genuinely contrite and remorseful for his involvement in the events of February 21, 1978.*

There is no evidence in the record of which this Court is aware that would indicate that Freddie Lee Hall is genuinely contrite and remorseful for his involvement in the events of February 21, 1978. This alleged mitigating circumstance is denied as a matter of law.

(w) *Freddie Lee Hall attempted to dissuade Mack Ruffin, Jr., from beating and killing Mrs. Hurst.*

The defense's evidence on this alleged mitigating circumstance is weak. The defendant did make statements in his testimony from the 1978 trial that he attempted to dissuade Mack Ruffin, Jr., from beating and killing Mrs. Hurst. The extent to which he attempted such dissuasion is uncertain. Testimony of other witnesses was contradictory. Nevertheless, the results of such alleged dissuation are certain and were fatal. The Court does not find this circumstance to be mitigating.

(x) *Mack Ruffin, Jr., the codefendant and only one tried and convicted for Mrs. Hurst's sexual battery, received a life sentence for her death.*

[24] This fact has been established. However, the Court does not find this fact to be mitigating in this cause.

(y) *Mack Ruffin, Jr., the "actual killer" of Karol Lea Hurst received a life sentence for her death.*

There is no doubt in the record that Mack Ruffin, Jr., received a life sentence for her death. There is some doubt in the record as to who was the actual killer of Karol Lea Hurst. The fact that Mack Ruffin, Jr., was given a life sentence for his role in the death of Karol Lea Hurst is not considered a mitigating factor by this Court under the particular facts of the instant case.

(z) *The defendant had alcoholic parents.*

The Court's response to this alleged mitigating circumstance is the same as that contained in paragraph (b) above.

(aa) *The defendant's mother may have been mentally ill.*

The Court's response to this alleged mitigating circumstance is the same as that contained in paragraph (b) above.

CONSIDERATION OF THE AGGRAVATING CIRCUMSTANCES VIS-A-VIS THE MITIGATING CIRCUMSTANCES

Though there are more alleged Mitigating Circumstances in this cause than there are Aggravating Circumstances found, number alone is not the consideration that should guide the Court. The Court has attempted to put itself in a position of a neutral arbitrator between the aggravating and mitigating circumstances. The Court has attempted to stand back from the situation and to look at this case in light of the totality of the circumstances.

When the Court looks at this case in light of the totality of the circumstances, the Court sees a modern American tragedy. A man raised under the most horrible [25] family circumstances imaginable, and with a questionable mental, emotional and psychological temperament, has brutally murdered a twenty-one year old woman who is seven months pregnant. The murder occurred under the most gruesome circumstances imaginable. The murder occurred while the young woman was begging for her life and that of her unborn child, after having been raped by one or both of her assailants. In the course of events springing from this kid-

napping, rape and murder, a deputy is killed and another shot at in the course of a high-speed chase.

The Court does find that it is "reasonably convinced" that one or more of their alleged mitigating circumstances has been established by the defendant. However, there is a paucity of evidence before the Court establishing any logical nexus between the alleged past or present problems of the defendant and the atrocity of his conduct on February 21, 1978. None of the defendant's experts offered any explanation or opinion as to the dynamics of how or when the mental conditions and deficits they noted eight to twelve years after the murder of Karol Lea Hurst contributed to its occurrence. It is unknown how the defendant's upbringing affected the circumstances of February 21, 1978. The portrait of Freddie Lee Hall presented to the Court, while it does evoke sympathy, does not establish any aspect of the defendant's character or record, or any circumstance of this offense that mitigates the extreme brutality of this offense.

The defense has produced a great number of circumstances that it wishes the court to find mitigating. The Court has found some of these factors to be reasonably established by the greater weight of the evidence. However, the Court is not aware of any case that makes the weighing factor simply a matter of counting the various aggravating circumstances and comparing them with the number of mitigating circumstances.

In essence, the mitigating circumstances proposed by the defense can be boiled down into three distinct and [26] primary categories. *See, Campbell v. State*, 16 FLW S.1, 2 (Jan. 4, 1991) N.4:

1. Mental, Emotional and Learning Disabilities.

2. Abused and deprived childhood.

3. Disparate treatment of an allegedly equally culpable defendant.

This Court has looked at the mitigating circumstances established by the defense in light of the aggravating circumstances established in this case beyond and to the exclusion of any reasonable doubt. The Court will not consider this weighing factor as simply a mathematical calculation, whereby the number of separate alleged mitigating circumstances produced by the defense are counted against the aggravated circumstances conclusively established by the state.

The most compelling of the mitigating circumstances in the Court's mind were those involving the defendant's childhood. The descriptions in the evidence of the childhood that the defendant experienced are horrifying. Yet, as disgusting as these descriptions are, the Court feels that they must be kept in their proper perspective. Do such gruesome experiences in childhood, even coupled with a mental, emotional and learning deficiency, so deprive a person of their free will that they are unable to resist killing a person who is begging for her life and that of her unborn child? The murder was not necessary for the defendant to carry out his planned crime of car theft and convenience store robbery. Said crime was only committed to cover up the identity of the victim's assailants, and possibly for thrill or hate or other such mal-expressed emotion. Others raised in similar childhood circumstances as Freddie Lee Hall have survived to adulthood and have not committed murders. The defendant had numerous brothers and sisters and, though some of them have fallen into a life of crime, none have committed the type of criminal atrocities for which this defendant stands

convicted. [27] Neighbors of the defendant, such as Roosevelt Johnson, have picked themselves up out of this quagmire of poverty and abuse to become meaningful and productive members of society. This is not to say that this Court would expect for Freddie Lee Hall, with all of his other mental and emotional problems, to become a productive and meaningful member of society, but likewise, neither his childhood experiences nor his mental and emotional disabilities, in the Court's mind, excuse the type of extreme and random violence for which this defendant stands convicted.

Likewise, the learning disabilities, mental retardation, and other mental difficulties, in this Court's mind, cannot be used to justify, excuse or extenuate the moral culpability of the defendant in this cause. While they certainly go to some degree to perhaps explain the crime, and, to some degree, do perhaps mitigate his culpability in the moral sense of the atrocity, such factors alone (or even in conjunction with all of the other mitigating circumstances in this case) do not serve to outweigh the substantial aggravation existing in the outrageous conduct of the defendant.

Some of defendant's behavior may be considered "impulsive" but much of his other actions defy that description. The initial decision of the defendant to steal the vehicle of the victim may have been impulsive, although even that is dubious, for the codefendants had discussed this matter in advance. However, throughout the ordeal leading up to the taking of the victim's life, the defendant had ample opportunity to make other decisions that would have spared the life of Karol Lea Hurst and her unborn child. The planning involved in this procedure, bearing in mind that Freddie Lee Hall was driving the victim alone from the grocery store in Leesburg for some 30 minutes prior to his first

stop in the woods, shows considerable, conscious premeditation and planning. Moreover, even after the victim was raped, beaten and killed, the defendant [28] still continued on his quest that same day to rob a convenience store for money. Even after the deputy was murdered at that bungled attempt at robbery, the defendant still demonstrated the mental faculties necessary to drive the getaway car at a high-speed chase in an attempt to avoid arrest. This Court does not believe that the defendant is as mentally, emotionally and cognitively disabled as the defense would have us believe. Here, the defendant shows more deliberation and planning than that which might be attributed to a typical retarded defendant. *See, e.g., Kight v. State*, 512 So.2d 922 (Fla.).

This Court believes that the defendant had a meaningful choice as to whether or not to take the life of Karol Lea Hurst on February 21, 1978, and that the defendant, though impaired to some degree by his personal history, mental and emotional difficulties, nevertheless made the voluntary decision to take the life of Karol Lea Hurst, or at least to stand by and to do nothing to prevent the taking of such life. Moreover, there is evidence in the record to suggest that the defendant may have even encouraged his codefendant to take the life of the victim, if he himself was not the actual perpetrator.

The defense has alleged as a separate major category suggesting mitigation, the fact that the codefendant of Mr. Hall, Mack Ruffin, Jr., was given a life sentence for his part in the murder of Karol Lea Hurst rather than a death sentence. The defense is correct that the fact that an accomplice in a crime in question, who is of equal or greater culpability, received a lesser sentence than the other codefendant, can be considered

mitigation. *Downs v. Dugar*, 514 F.2d 1069 (Fla. 1987). *Gaffard v. State*, 387 So.2d 333 (Fla. 1980) and *Slater v. State*, 316 So.2d 539, 542 (Fla.1975).

Nevertheless, the operative words in supporting mitigation under this broad category of disparate treatment of an accomplice, are the words "who was of equal or greater [29] culpability." In the case at bar the evidence would suggest that Freddie Lee Hall was the more culpable and dangerous of the two defendants charged in this crime. Though this state does not have before it the record of the sentencing proceeding of Mr. Ruffin, and thus does not know what evidence was presented to the jury in Mr. Ruffin's case, this Court believes that the evidence present in the instant case would demonstrate that Mr. Hall was the more culpable, and that thus Mack Ruffin, Jr., was not an accomplice who was "of equal or greater culpability."

The facts of the instant case reflect that clearly Mr. Hall was the defendant who was primarily responsible for the kidnapping of Karol Lea Hurst. He alone drove the car away from the grocery store while the victim sat in the front seat. There is substantial evidence to suggest that Mr. Hall raped the victim. There is substantial evidence that Mr. Hall at least encouraged and dared Mr. Ruffin to execute the victim, if in fact Mr. Hall was not himself the executioner. Though the Court admits that there is some confusion throughout all the testimony in this cause as to who actually pulled the trigger that caused the death of Karol Lea Hurst and deputy Lonnie Coburn, it is clear that Mr. Hall was the older and the larger of the two defendants. Everything in the evidence indicates that Mr. Hall was the leader of the pact of two that accomplished this varied and random violence on February 21, 1978. This Court believes that the totality of the reasonable inferences in

the entire evidence available in this case indicates that the defendant, Freddie Lee Hall, is the more culpable defendant. Thus, where the two defendants are not equally culpable, and Mack Ruffin, Jr., is certainly not the most culpable of the defendants, then there is not disparate treatment if Freddie Lee Hall were to receive a sentence of death for his part in the crimes of February 21, 1978, when Mack Ruffin, Jr., has received a sentence of life. Where there is a reason for [30] the disparate treatment such as that allowed by law and evidenced by the facts in the case as set forth herein, then this alleged circumstance of disparate treatment cannot be and is not found to be a mitigating circumstance.

CONSIDERATION OF THE JURY VERDICT

The jury in the resentencing phase of this case received all of the mitigating evidence that the defense could muster during the trial. The defense was given considerable assistance, monetary and otherwise, from the trial courts in obtaining the assistance of whatever experts were necessary to make the evidentiary showing that they desired for mitigation. The defense was able to procure numerous experts, some of national reputation, to evaluate the defendant and to state their findings and conclusions. No reasonable expense was spared the defense in the preparation of their case.

Moreover, the defense took full use of all of their peremptory challenges as well as other challenges during the voir dire portion of the "new" penalty phase of this case. The Court was most liberal in excusing jurors for cause, and the defense used all of their peremptory challenges plus one additional peremptory challenge in obtaining the jury they did. The jury finally selected to hear this case reflected a cross-section of

the community, (Fifth Judicial Circuit), including both men and women, blacks and whites.

Throughout this proceeding, the defendant was represented by three (3) experienced, capable, and motivated defense attorneys. These defense attorneys presented a remarkable case, and they did everything that they legally and ethically could to present the defendant to the jury in the "best" light possible.

After all of the evidence that the jury was given by the defense in the way of mitigation and extenuation [31] during this six-day resentencing proceeding, and after vigorous argument by counsel and approximately 1-1/2 hours of deliberation, the jury returned an "Advisory or Recommended" Verdict for death by a vote of eight to four. This two-thirds majority opinion for death comes to this Court ostensibly with some presumption of correctness and is entitled by law to and must be given great weight by this Court in determining what sentence to impose in this case. *Mann v. Dugger*, 844 F.2d 1446; *McCampbell v. State*, 421 So.2d 1072, 1075 (Fla. 1982).

It is only under rare circumstances that this Court could impose a sentence other than what is recommended by the jury, although, the Court obviously has the right, in appropriate circumstances, to exercise its prerogative of judicial override.

CONCLUSION AND SENTENCE

On February 21, 1978, Freddie Lee Hall kidnapped Karol Lea Hurst from the parking lot of a grocery store as she was carrying her packages to her car. He drove her, in her own car, some 18 miles away into another county and into the woods a quarter of a mile off the paved road. There, in the front seat of her car, he

forced her to remove her clothes and then he raped her. He listened to her cry, and he listened to her beg for her life and the life of her unborn child. He watched her write a check for him to cash in return for her life. Then he beat her—so hard that it tore the flesh of her neck and shoulders through the fabric of her denim jacket. And then he killed her by firing a bullet into the back of her head, either pulling the trigger himself or encouraging another to do it in his place. There is no evidence that has been presented to this Court that reasonably mitigates the aggravated nature of this act. The aggravating circumstances of this case clearly "outweigh" the mitigating factors.

[32] A jury has heard every piece of evidence before the Court, and having been instructed on the law of the State of Florida, they have recommended that Freddie Lee Hall be sentenced to death. That recommendation is legally and morally appropriate, and the Court shall follow that appropriate "advisory" verdict and sentence the defendant to death.

Dated this 21st day of February, 1991.

/s/ Richard Tombrink Jr.
Honorable Richard Tombrink, Jr.,
Circuit Judge

Cc: Anthony Tatti, Assistant State Attorney
T. Michael Johnson, Assistant State Attorney

[handwritten note:
by hand delivery
2/21/91
RTJ]

SUPREME COURT OF FLORIDA

No. 77563

FREDDIE LEE HALL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

January 14, 1993

[614 So. 2d 473]

* * *

[475]

PER CURIAM.

Freddie Lee Hall appeals the sentence of death imposed on him on resentencing. We have jurisdiction pursuant to article V, section 3(b)(1), Florida Constitution, and affirm Hall's sentence.

In February 1978 Hall and Mack Ruffin decided to steal a car to use in a robbery. Spotting a twenty-one-year-old housewife, who was seven months pregnant, in a grocery store parking lot, Hall forced her into her car and drove that car to a secluded wooded area. Ruffin followed in his car. After reaching their destination, both men raped the victim, after which she was beaten and shot and her body dragged further into the woods. Later that day, they drove the victim's car to a convenience store where they killed a deputy sheriff. The

handgun shown to have killed the female victim was found under the deputy's body.

In separate trials their juries convicted both Hall and Ruffin of first-degree murder and recommended that they be sentenced to death, which their trial judges did.[1] This Court affirmed Hall's conviction and sentence. *Hall v. State*, 403 So.2d 1321 (Fla.1981). Later, however, this Court ordered that Hall be resentenced because of error under *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). *Hall v. State*, 541 So.2d 1125 (Fla.1989).

At the resentencing the state produced witnesses and prior testimony to make the jury aware of the underlying facts and to prove aggravators. Hall presented numerous witnesses, including, among others, his original trial and appellate attorneys, two sisters, two brothers, three other family members and acquaintances, a professor of special education, a psychiatrist, a psychologist, and a criminologist in his attempt to establish mitigators. The jury, however, recommended that he be sentenced to death, which the trial court did.

Each side started voir dire with ten peremptory challenges, and Hall eventually used his last peremptory to remove a prospective juror that the court refused to remove for cause. Claiming that there was one more

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[1] We affirmed Ruffin's conviction and sentence. *Ruffin v. State*, 397 So.2d 277 (Fla.), *cert. denied*, 454 U.S. 882, 102 S.Ct. 368, 70 L.Ed.2d 194 (1981). A federal court granted Ruffin a resentencing based on *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). *Ruffin v. Dugger*, 848 F.2d 1512 (11th Cir.1988), *cert. denied*, 488 U.S. 1044, 109 S.Ct. 872, 102 L.Ed.2d 995 (1989). At resentencing Ruffin's jury recommended life imprisonment, which the trial court imposed. *Ruffin v. State*, 589 So.2d 403 (Fla. 5th DCA1991).

person on the panel that he would excuse, Hall asked for more challenges. The court said that the last person Hall challenged was at least arguable as to removal for cause and gave him one more challenge, which Hall used. After the state struck another prospective juror, Hall [476] asked for still more challenges because he did not want Cavanaugh, the last person called to the panel, on the jury. The state objected that granting more challenges in a piecemeal fashion was unfair to the state, and the court refused any more challenges. Hall did not challenge Cavanaugh for cause, but moved for a mistrial because the court refused to give him more challenges. He had no authority to cite for this claim, and the state argued that granting more challenges was within the court's discretion. The court agreed and denied the motion. Now, Hall argues that because Cavanaugh had been exposed to prejudicial publicity and juror misbehavior the court erred in refusing him an additional peremptory challenge. We disagree.

"To show reversible error, a defendant must show that all peremptories had been exhausted and that an objectionable juror had to be accepted." *Pentecost v. State*, 545 So.2d 861, 863 n. 1 (Fla.1989); *Trotter v. State*, 576 So.2d 691 (Fla.1990). Although Hall claimed that he would have excused Cavanaugh, the record discloses that, even though Cavanaugh had seen a newspaper headline about Hall's resentencing, he did not read the article and that Cavanaugh did not hear what some jurors were talking about in the hallway. We have previously held that the competency of a challenged juror is a mixed question of law and fact, the resolution of which is within the trial court's discretion. *Singer v. State*, 109 So.2d 7 (Fla.1959). Hall has shown no abuse of discretion in the trial court's refusal to grant him

more peremptory challenges, and there is no merit to this issue.

Hall filed a lengthy proposed instruction to explain why he was being resentenced. The state objected that the explanation was irrelevant and confusing, and the court refused to give the proposed instruction. "Jury instructions must relate to issues concerning evidence received at trial", and confusing, contradictory, or misleading instructions should not be given. *Butler v. State*, 493 So.2d 451, 452 (Fla.1986). Hall has shown no abuse of discretion in the court's refusal to give the proposed instruction, and this issue has no merit.

The state tried Hall and Ruffin together for the deputy's murder. The jury convicted each of first-degree murder and recommended that Ruffin be sentenced to life imprisonment and that Hall be sentenced to death, and the trial court agreed with those recommendations. On appeal the district court affirmed Ruffin's conviction of first-degree murder. *Ruffin v. State*, 390 So.2d 841 (Fla. 5th DCA1980). In considering Hall's appeal of his conviction and death sentence, however, this Court vacated the sentence and reduced Hall's conviction to second-degree murder because, although both Hall and Ruffin were guilty of murder, premeditated, first-degree murder had not been proved. *Hall v. State*, 403 So.2d 1319 (Fla.1981).

At resentencing Hall sought to introduce Ruffin's conviction of first-degree murder to contrast with his own second-degree murder conviction. The state objected and argued that if this were allowed it should be allowed to explain the differences in the codefendants' convictions. The judge held that he would allow both sides to argue the significance of Ruffin's conviction, and Hall decided not to introduce that conviction. Now,

Hall argues that the court erred in refusing to let him introduce the conviction without the state being able to explain it.

We find no merit to Hall's argument. If Ruffin's conviction for murdering the deputy had come to this Court, no doubt it, as well as Hall's, would have been reduced to second-degree murder. *See Moreland v. State*, 582 So.2d 618 (Fla.1991). The admitting of evidence is within the trial court's discretion. *Blanco v. State*, 452 So.2d 520 (Fla.1984), *cert. denied*, 469 U.S. 1181, 105 S.Ct. 940, 83 L.Ed.2d 953 (1985). Hall has demonstrated no abuse of discretion in the trial court's ruling that the state would be able to explain Ruffin's conviction.

As stated earlier, seven of Hall's relatives and friends testified on his behalf. When he sought to introduce testimony [477] from four other relatives, the state objected to their testimony as being cumulative, repetitious, and redundant. The parties then stipulated that the jury would be told that these witnesses "would have testified to the same factual circumstances that other family witnesses have testified to." It is within the trial court's discretion to exclude cumulative evidence. *Muehleman v. State*, 503 So.2d 310 (Fla.), *cert. denied*, 484 U.S. 882, 108 S.Ct. 39, 98 L.Ed.2d 170 (1987). Hall has shown no abuse of discretion, and there is no merit to his argument that the court erred in excluding this testimony.

As noted earlier, Hall's jury recommended that he be sentenced to death. In agreeing with that recommendation the court wrote: "It is only in rare circumstances that this court could impose a sentence other than what is recommended by the jury, although the court obviously has the right, in appropriate circum-

stances, to exercise its prerogative of judicial override." Hall now argues that the "rare circumstances" language shows that the court used the wrong standard in considering the jury's recommendation. We disagree. As we have stated previously: "Notwithstanding the jury recommendation ... the judge is required to make an independent determination, based on the aggravating and mitigating factors." *Grossman v. State*, 525 So.2d 833, 840 (Fla.1988), *cert. denied*, 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989). This judge recognized that the final decision as to penalty was his and conscientiously weighed and discussed the aggravating and mitigating evidence and made his decision based on the evidence. We are convinced that he applied the proper standard.

In sentencing Hall to death the court found that seven aggravators had been established: 1) previous conviction of violent felony (assault with intent to commit rape, second-degree murder, shooting at or into an occupied vehicle); 2) under sentence of imprisonment (on parole for the assault conviction); 3) committed during the commission of kidnapping and sexual battery; 4) committed for pecuniary gain (stealing the victim's car); 5) heinous, atrocious, or cruel; 6) cold, calculated, and premeditated; and 7) committed to avoid or prevent arrest. Because his original sentencing judge found only three aggravators, Hall now argues that the resentencing court could not find the additional four. We recently considered this issue and, contrary to Hall's argument, held that, because a resentencing is a totally new proceeding, the resentencing court is not bound by the original court's findings. *Preston v. State*, 607 So.2d 404 (Fla.1992). Thus, there is no merit to Hall's argument.

Hall also argues that the state did not prove the avoid, prevent arrest and cold, calculated, and premeditated aggravators.[2] We disagree. We have long held that, when the victim is not a law enforcement officer, eliminating a witness must be the dominant motive for the murder to support finding the avoid, prevent arrest aggravator. *E.g., Bates v. State*, 465 So.2d 490 (Fla.1985). Circumstantial evidence can be used to prove this aggravator, and we have uniformly upheld finding this aggravator when the victim is transported to another location and then killed. *E.g., Preston; Swafford v. State*, 533 So.2d 270 (Fla.1988), *cert. denied*, 489 U.S. 1100, 109 S.Ct. 1578, 103 L.Ed.2d 944 (1989); *Engle v. State*, 510 So.2d 881 (Fla.1987), *cert. denied*, 485 U.S. 924, 108 S.Ct. 1094, 99 L.Ed.2d 256 (1988); *Cave v. State*, 476 So.2d 180 (Fla.1985), *cert. denied*, 476 U.S. 1178, 106 S.Ct. 2907, 90 L.Ed.2d 993 (1986); *Copeland v. State*, 457 So.2d 1012 (Fla.1984), *cert. denied*, 471 U.S. 1030, 105 S.Ct. 2051, 85 L.Ed.2d 324 (1985); *Card v. State*, 453 So.2d 17 (Fla.), *cert. denied*, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984); *Martin v. State*, 420 So.2d 583 (Fla.1982), *cert. denied*, 460 U.S. 1056, 103 S.Ct. 1508, 75 L.Ed.2d 937 (1983). Here, the evidence leaves no reasonable inference except that Hall and Ruffin killed the victim to eliminate the only witness to their having kid- [478] napped and raped her and having stolen her car.[3]

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[2] Hall does not challenge the applicability of the five other aggravators, and our review of the record shows them to have been established beyond a reasonable doubt.

[3] Even if we were to hold that this aggravator should not have been found, given the strong remaining aggravators, any error would be harmless.

The evidence also supports finding the murder to have been committed in a cold, calculated, and premeditated manner with no pretense of moral or legal justification. The record shows that Hall and Ruffin intended to steal the victim's car. To that end, they could have taken the car and simply left her in the parking lot. Instead, however, they abducted, raped, beat, and finally killed her. Even if Hall did not fire the shot that killed the victim, he was a willing if not predominant participant in the other acts. *Copeland*; *Cave*. The totality of the circumstances show this murder to have been committed in a cold, calculated, and premeditated manner. There is no merit to Hall's argument that his mental retardation provided a pretense of moral or legal justification. *Cf. Jones v. State*, 612 So.2d 1370 (Fla.1992) (sense of rejection does not provide a valid pretense); *Williamson v. State*, 511 So.2d 289 (Fla.1987) (no pretense of justification where victim had not threatened defendant), *cert. denied*, 485 U.S. 929, 108 S.Ct. 1098, 99 L.Ed.2d 261 (1988). Additionally, it is not improper to apply this aggravator to killings committed before the legislature adopted it. *Sireci v. State*, 587 So.2d 450 (Fla.1991), *cert. denied*, 503 U.S. 946, 112 S.Ct. 1500, 117 L.Ed.2d 639 (1992).

We also find no merit to Hall's contention that the heinous, atrocious, or cruel aggravator is unconstitutionally vague.[4] In *Espinosa v. Florida*, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), the United

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[4] We have previously rejected Hall's constitutional claims or claims very similar to them. *E.g.*, *Ragsdale v. State*, 609 So.2d 10 (Fla.1992); *Sireci v. State*, 587 So.2d 450 (Fla.1991), *cert. denied*, 503 U.S. 946, 112 S.Ct. 1500, 117 L.Ed.2d 639 (1992); *Jones v. State*, 569 So.2d 1234 (Fla.1990); *Hitchcock v. State*, 578 So.2d 685 (Fla.1990), *vacated on other grounds*, 505 U.S. 1215, 112 S.Ct. 3020, 120 L.Ed.2d 892 (1992); *Eutzy v. State*, 541 So.2d 1143 (Fla.1989).

States Supreme Court declared our former instruction[5] on this aggravator invalid. Hall's trial judge, however, gave his jury the new instruction as follows:

> Six, the crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel. Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means that designed to inflict a high degree of pain with utter indifference to, or even enjoyment of the suffering of others. The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

This instruction defines the terms sufficiently to save both the instruction and the aggravator from vagueness challenges.

Hall also attacks the trial judge's findings in regards to the mitigating evidence. We disagree that the judge committed reversible error or that death is disproportionate for this killing. The judge considered four statutory mitigators and more than twenty items of nonstatutory mitigating evidence grouped into three general areas, i.e., mental, emotional, and learning disabilities; abused and deprived childhood; and disparate treatment of co-perpetrator. Although the judge initially stated that some of the mitigating evidence was "unquantifiable," he later spent almost six pages analyzing the mitigating evidence and concluded that

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[5] Formerly, the instructions listed this aggravator as "especially wicked, evil, atrocious or cruel" without defining any of those terms.

whatever mitigators had been established did not outweigh the aggravators.

In considering allegedly mitigating evidence the court must decide if "the facts alleged in mitigation are supported by the evidence," if those established facts are "capable of mitigating the defendant's punishment, i.e., ... may be considered as extenuating or reducing the degree of moral culpability for the crime [479] committed", and if "they are of sufficient weight to counterbalance the aggravating factors." *Rogers v. State*, 511 So.2d 526, 534 (Fla.1987), *cert. denied*, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988); *Campbell v. State*, 571 So.2d 415 (Fla.1990). "The decision as to whether a mitigating circumstance has been established is within the trial court's discretion." *Preston*, 607 So.2d at 412. The judge carefully and conscientiously applied the *Rogers* standard and resolved the conflicts in the evidence, as was his responsibility. *Gunsby v. State*, 574 So.2d 1085 (Fla.), *cert. denied*, 502 U.S. 843, 112 S.Ct. 136, 116 L.Ed.2d 103 (1991). The record supports his conclusion that the mitigators either had not been established or were entitled to little weight. *Preston*; *Ponticelli v. State*, 593 So.2d 483 (Fla.1991), *vacated on other grounds*, 506 U.S. 802, 113 S.Ct. 32, 121 L.Ed.2d 5 (1992).

We also reject Hall's claim that his death sentence is not proportionate. These crimes were a joint operation, with each defendant responsible for the other's acts. *James v. State*, 453 So.2d 786 (Fla.), *cert. denied*, 469 U.S. 1098, 105 S.Ct. 608, 83 L.Ed.2d 717 (1984). Even though Ruffin received a life sentence, the different treatment given Hall is appropriate. As noted by the trial judge, Hall was bigger and older than Ruffin and was the leader. Before the date of this crime he had been convicted of a violent crime and was on pa-

role, whereas Ruffin had no such criminal history. Also, Ruffin's resentencing jury recommended that he be sentenced to life imprisonment. Hall, on the other hand, has received a death recommendation from every jury he has appeared before. The disparate treatment is fully warranted.[6] The aggravators clearly outweigh the mitigating evidence, and this cruel, cold-blooded murder clearly falls within the class of killings for which the death penalty is properly imposed. *E.g.*, *Swafford* (victim abducted, raped, and killed); *Engle* (same); *Cave* (co-perpetrators abducted, raped, and killed victim; defendant not actual killer); *Copeland* (same).

Therefore, we affirm the death sentence imposed on Hall on resentencing.

It is so ordered.

OVERTON, McDONALD, SHAW, GRIMES and HARDING, JJ., concur.

BARKETT, C.J., dissents with an opinion, in which KOGAN, J., concurs.

BARKETT, Chief Justice, dissenting.

I cannot agree with the majority's conclusions regarding Freddie Lee Hall's sentence. Specifically, I cannot agree that "the record supports [the trial judge's] conclusion that the mitigators either had not been established or were entitled to little weight." Majority op. at 479.

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[6] *Scott v. Dugger*, 604 So.2d 465 (Fla.1992), is factually distinguishable and, therefore, no basis for relief.

The testimony reflects that Hall has an IQ of 60; he suffers from organic brain damage, chronic psychosis, a speech impediment, and a learning disability; he is functionally illiterate; and he has a short-term memory equivalent to that of a first grader. The defense's four expert witnesses who testified regarding Hall's mental condition stated that his handicaps would have affected him at the time of the crime. As the trial judge noted in the resentencing order, Freddie Lee Hall was "raised under the most horrible family circumstances imaginable."

Indeed, the trial judge found that Hall had established substantial mitigation. The judge wrote that the evidence conclusively demonstrated that Hall "may have been suffering from mental and emotional disturbances and may have been, to some extent, unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." Additionally, the judge found that Hall suffers from organic brain damage, has been mentally retarded all of his life, suffers from mental illness, suffered tremendous emotional deprivation and disturbances throughout his life, suffered tremendous physical abuse and torture as a child, and has learning [480] disabilities and a distinct speech impediment that adversely affected his development.

Hall's mental deficiency as an adult is not surprising. The sixteenth of seventeen children, Hall was tortured by his mother and abused by neighbors. Various relatives testified that Hall's mother tied him in a "croaker" sack, swung it over a fire, and beat him; buried him in the sand up to his neck to "strengthen his legs"; tied his hands to a rope that was attached to a ceiling beam and beat him while he was naked; locked him in a smokehouse for long intervals; and held a gun

on Hall and his siblings while she poked them with sticks. Hall's mother withheld food from her children because she believed a famine was imminent, and she allowed neighbors to punish Hall by forcing him to stay underneath a bed for an entire day.

Hall's school records reflect his mental deficiencies. His teachers in the fourth, sixth, seventh, and eighth grades described him as mentally retarded. His fifth grade teacher stated that he was mentally maladjusted, and still another teacher wrote that "his mental maturity is far below his chronological age."

The U.S. Supreme Court has expressed the view that the Eighth Amendment does not categorically prohibit execution of the mentally retarded. *Penry v. Lynaugh*, 492 U.S. 302, 340, 109 S.Ct. 2934, 2958, 106 L.Ed.2d 256 (1989). Nonetheless, the Court noted in *Penry* that "evolving standards of decency that mark the progress of a maturing society" may ultimately lead to a national consensus against executing the mentally retarded. *Id.*; *see Trop v. Dulles*, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958). Since *Penry* was decided, Kentucky, Maryland, New Mexico, and Tennessee have passed legislation exempting mentally retarded people from the death penalty. *See* V. Stephen Cohen, Comment, *Exempting the Mentally Retarded from the Death Penalty: A Comment on Florida's Proposed Legislation*, 19 Fla.St.U.L.Rev. 457, 468 (1991). Additionally, the Georgia Supreme Court has found that execution of the mentally retarded violates its state constitutional provision against cruel and unusual punishment. *Fleming v. Zant*, 259 Ga. 687, 386 S.E.2d 339 (1989). The Georgia court wrote:

> The "standard of decency" that is relevant to the interpretation of the prohibition against

> cruel and unusual punishment found in the Georgia Constitution is the standard of the people of Georgia, not the national standard. Federal constitutional standards represent the minimum, not the maximum, protection that this state must afford its citizens. Thus, although the rest of the nation might not agree, under the Georgia Constitution, the execution of the mentally retarded constitutes cruel and unusual punishment.

Id. 386 S.E.2d at 342 (citation omitted).[7]

Floridians' attitudes toward the mentally retarded have evolved significantly in recent decades. Those mentally retarded people committed to state care no longer are warehoused in "training centers," and a variety of procedural safeguards have been enacted to protect the rights of those committed to state facilities. *See* § 393.11, Fla.Stat. (1991) (regulating involuntary admission of the mentally retarded to state residential services); *see also* David A. Davis, *Executing the Mentally Retarded*, Fla.Bar.J., February 1991, at 13, 15 (discussing generally how statutes have changed to reflect a more enlightened approach to caring for the mentally retarded).

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[7] In determining its state standards of decency, the Georgia court relied in part on a prospective legislative enactment that was passed after the trial of the defendant. *Fleming v. Zant*, 386 S.E.2d 339, 342 (Ga.1989). The Georgia statute was a response to public outrage over the 1986 execution of Jerome Bowden, a mentally retarded man with an IQ of 59. V. Stephen Cohen, Comment, *Exempting the Mentally Retarded from the Death Penalty: A Comment on Florida's Proposed Legislation*, 19 Fla.St.U.L.Rev. 457, 468 n. 117 (1991).

Society has developed a greater understanding of mental retardation. It is generally recognized now that mental retardation is a permanent learning disability that manifests itself in several predictable ways, including poor communication skills, short memory, short attention span, and [481] immature or incomplete concepts of blameworthiness and causation. Davis, Fla.Bar J. at 13; *see also* James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo.Wash.L.Rev. 414, 417 (1985); John Blume & David Bruck, *Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis*, 41 Ark.L.Rev. 725, 732-34 (1988). A person who is mentally retarded is not just "slower" than the average person. Mental retardation is "a severe and permanent mental impairment that affects almost every aspect of a mentally retarded person's life." Blume & Bruck, 41 Ark.L.Rev. at 734.

It would appear that the trial judge did not understand the nature of mental retardation. Otherwise, he could not have reached the conclusion that the mitigating factors were entitled to little weight because he could not "definitely establish that they affected Hall at the time of the crime."

This Court has not addressed whether executing the mentally retarded is cruel or unusual punishment under article I, section 17 of the Florida Constitution. I believe it is appropriate to analyze whether imposition of capital punishment in such circumstances is either "cruel" or "unusual."[8] First, because a mentally retarded person such as Freddie Lee Hall has a lessened

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[8] Unlike the Eighth Amendment, which prohibits cruel *and* unusual punishment, article I, section 17 prohibits cruel *or* unusual punishment. The use of the disjunctive indicates that alternatives were intended. *Tillman v. State*, 591 So.2d 167, 168 n. 2 (Fla.1991).

ability to determine right from wrong and to appreciate the consequences of his behavior, imposition of the death penalty is excessive in relation to the crime committed. *Coker v. Georgia*, 433 U.S. 584, 592, 97 S.Ct. 2861, 2866, 53 L.Ed.2d 982 (1977). As Justice Brennan noted in *Furman v. Georgia*, 408 U.S. 238, 257, 92 S.Ct. 2726, 2736, 33 L.Ed.2d 346 (1972) (Brennan, J., concurring), a punishment is excessive when it is unnecessary. An excessive punishment "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering." *Coker*, 433 U.S. at 592, 97 S.Ct. at 2866 (discussing *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)). I believe imposing the death penalty on mentally retarded defendants is excessive, serves no purpose except to dispose of those some might deem to be "unacceptable members" of society, and therefore, is "cruel."

Second, executing a mentally retarded defendant such as Hall is "unusual" because it is disproportionate. Because mentally retarded individuals are not as culpable as other criminal defendants, I would find that the death penalty is always disproportionate when the defendant is proven to be retarded. However, even without a per se rule, Hall's mental retardation and his horrible childhood represent substantial mitigation, which makes the death penalty disproportionate despite the existence of several aggravating factors. *See, e.g., Nibert v. State*, 574 So.2d 1059, 1063 (Fla.1990); *Smalley v. State*, 546 So.2d 720 (Fla.1989); *Blakely v. State*, 561 So.2d 560 (Fla.1990). This case is illustrative of far too many cases we see at this Court; horrible crimes are repeatedly committed by those who endure sickening abuse and deprivation as children. Many, like Freddie Lee Hall, are also mentally retarded and suffer

particularly severe abuse because their parents do not understand the nature of retardation. The connection between an individual's childhood and his or her later ability to function as a productive member of society is obvious to those of us who routinely review criminal cases, and while a tragic childhood and mental retardation do not "excuse" later criminal behavior, they do reflect on an individual's culpability.

The law requires that the death penalty be reserved for the most heinous of crimes and the most culpable of murderers. *See, e.g., Songer v. State*, 544 So.2d 1010, 1011 (Fla.1989); *State v. Dixon*, 283 So.2d 1, 8 (1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). The crime committed in this case undoubtedly was heinous. A young woman, seven months pregnant, was raped, beaten, and shot to death. The horrible nature of this crime is [482] uncontroverted, and it is certainly among the types of offenses for which the death penalty may be imposed. However, Freddie Lee Hall is not among the most culpable of murderers. Hall's judgment, thought processes, and actions are unquestionably affected by his mental retardation. He cannot understand right from wrong in the way that most members of our society do, and while he should spend the rest of his life in prison, he should not be executed.

In evaluating both the "cruel" and "unusual" punishment prohibitions of article I, section 17 and the evolving standards of decency in Florida regarding the mentally retarded, I find that executing the mentally retarded violates the state constitution. Consequently, I would remand Hall's case for imposition of a sentence of life imprisonment.

KOGAN, J., concurs.

SUPREME COURT OF FLORIDA

No. 92,008

FREDDIE LEE HALL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

July 1, 1999

[742 So. 2d 225]

* * *

[225]

PER CURIAM.

Freddie Lee Hall, a prisoner under sentence of death, appeals the trial court's order denying his motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. We affirm the trial court's order for the reasons expressed herein.

Hall and an accomplice, Mack Ruffin, were convicted in separate trials of the February 1978 abduction and murder of a young woman. The facts of this crime are set forth in detail in our opinion on direct appeal. *See Hall v. State*, 403 So.2d 1321, 1323 (Fla.1981). Both Hall and Ruffin were sentenced to die in the electric chair. This Court affirmed Hall's conviction and sentence. *Hall*, 403 So.2d at 1325. In September 1982, Hall's first death warrant was signed. Hall filed a rule

3.850 motion, and this Court affirmed the circuit court's denial of that motion and denied Hall's petition for a writ of habeas corpus. *Hall v. State*, 420 So.2d 872, 874 (Fla.1982). A [226] federal district court granted a temporary stay of execution but eventually denied relief. *Hall v. Wainwright*, 565 F.Supp. 1222, 1244 (M.D.Fla.1983). The Eleventh Circuit affirmed in part and reversed in part the district court's decision and remanded the case for an evidentiary hearing. *Hall v. Wainwright*, 733 F.2d 766, 778 (11th Cir.1984). The district court again denied relief, and the Eleventh Circuit affirmed. *Hall v. Wainwright*, 805 F.2d 945, 948 (11th Cir.1986). Hall then petitioned this Court for a writ of habeas corpus based on a claim that his sentencing proceeding violated *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). This Court held that any error in the sentencing proceeding was harmless. *Hall v. Dugger*, 531 So.2d 76, 78 (Fla.1988). Hall's second death warrant set execution for September 20, 1988. Hall filed his second rule 3.850 motion, which the circuit court denied. On appeal, this Court considered additional non-record facts and ordered that Hall be resentenced because of a *Hitchcock* error in sentencing. *Hall v. State*, 541 So.2d 1125, 1128 (Fla.1989). On resentencing, the jury recommended a death sentence, and the judge imposed it, finding seven aggravators and "unquantifiable" nonstatutory mitigation. *State v. Hall*, No. 78-52-CF (Fla. 5th Cir.Ct., Feb. 21, 1991) (Findings of Fact for Sentencing Order). This Court affirmed. *Hall v. State*, 614 So.2d 473 (Fla.1993).

Hall filed the present rule 3.850 motion to seek relief from this resentencing judgment, and it is the denial of that motion which is the subject of this appeal. The circuit court summarily denied all but one of Hall's thirty-three claims. The circuit court held an eviden-

tiary hearing on August 25, 1997, as to Hall's claim that he was incompetent to proceed in the resentencing. Following the hearing, the trial court issued a sixty-five page order denying all relief. *State v. Hall*, No. 78-52-CF (Fla. 5th Cir.Ct., Oct. 31, 1997) (Final Order). Hall raises five claims in this appeal.[1]

We find that Hall's first, third, and fifth claims are procedurally barred and that Hall fails to demonstrate any merit to his fourth claim. These four claims warrant only limited discussion. In his first claim, Hall argues that the Florida capital sentencing statute is unconstitutional facially and as applied in allowing the death penalty for an incompetent or mentally retarded person. This claim is procedurally barred because it was not raised on direct appeal. *See Remeta v. Dugger*, 622 So.2d 452, 455-56 (Fla.1993). Issues that could have been raised on direct appeal but were not are noncognizable claims through collateral attack. *See Teffeteller v. State*, 24 Fla. L. Weekly S110, 734 So.2d 1009 (Fla.1999); *Johnson v. State*, 593 So.2d 206 (Fla.1992); *Smith v. State*, 445 So.2d 323 (Fla.1983). Likewise, Hall's third claim, that execution by electrocution is cruel or unusual punishment or both under the Florida and United States Constitutions, is procedurally barred

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[1] Hall claims that: (1) the Florida capital sentencing statute is unconstitutional facially and as applied in allowing the death penalty for an incompetent or mentally retarded person; (2) Hall's resentencing was unconstitutional in that he is a mentally retarded person who was not competent to be resentenced; (3) execution by electrocution is cruel or unusual punishment or both under the Florida and United States Constitutions; (4) the trial court's summary denial of all but one issue raised in Hall's 3.850 motion violated Hall's rights to substantive and procedural due process; (5) fundamental error occurred in the trial court's finding that aggravators outweighed mitigators in the resentencing.

because it was not raised on direct appeal. *Teffeteller*; *Remeta*.

In his fifth claim, Hall contends that an error occurred in the trial court's finding that aggravators outweighed mitigators in the resentencing. The trial court correctly found this claim to be procedurally barred in that it was raised and addressed by this Court on direct appeal. *See* Final Order at 58. This Court held as follows in Hall's second direct appeal:

> [227] Hall also attacks the trial judge's findings in regards to the mitigating evidence. We disagree that the judge committed reversible error or that death is disproportionate for this killing. The judge considered four statutory mitigators and more than twenty items of nonstatutory mitigating evidence grouped into three general areas, i.e., mental, emotional, and learning disabilities; abused and deprived childhood; and disparate treatment of coperpetrator. Although the judge initially stated that some of the mitigating evidence was "unquantifiable," he later spent almost six pages analyzing the mitigating evidence and concluded that whatever mitigators had been established did not outweigh the aggravators.
>
> In considering allegedly mitigating evidence the court must decide if "the facts alleged in mitigation are supported by the evidence," if those established facts are "capable of mitigating the defendant's punishment, i.e., ... may be considered as extenuating or reducing the degree of moral culpability for the crime committed," and if "they are of sufficient weight to counterbalance the aggravating fac-

> tors." *Rogers v. State*, 511 So.2d 526, 534 (Fla.1987), *cert. denied*, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988); *Campbell v. State*, 571 So.2d 415 (Fla.1990). "The decision as to whether a mitigating circumstance has been established is within the trial court's discretion." *Preston [v. State]*, 607 So.2d [404] at 412 [(Fla.1992)]. The judge carefully and conscientiously applied the *Rogers* standard and resolved the conflicts in the evidence, as was his responsibility. The record supports his conclusion that the mitigators either had not been established or were entitled to little weight.

Hall, 614 So.2d at 478-79 (citations omitted).

In his fourth claim, Hall contends that the circuit court's summary denial of all but one issue raised in Hall's 3.850 motion violated his rights to substantive and procedural due process. After reviewing all of the claims raised, the circuit judge stated in a sixty-five page postconviction order his rationale, based on the record, for denying relief on each claim, including the ineffective assistance of counsel claims. *See* Final Order. Hall provides no substantive basis for support of his claim that the circuit court's detailed order in respect to these claims was erroneous. We appreciate the circuit court's fully delineating its ruling on each issue. We reject Hall's fourth claim in this appeal as being plainly insufficient.

This brings us to Hall's remaining claim, in which he contends that the postconviction circuit court erred in finding him competent to proceed at resentencing. Hall argues that his resentencing was unconstitutional in that the effects of his mental retardation rendered him incompetent to be resentenced. Hall further contends that

the court erred because it had an incomplete understanding of how mental retardation affects competency.

At the evidentiary hearing below, Hall presented the testimony of two of Hall's three resentencing counsel and four mental health experts. Hall also introduced into evidence copies of his medical records from the Department of Corrections between 1978 and 1996. Counsel Patricia Jenkins testified at the hearing that Hall was rational during resentencing but did not participate in planning trial strategy. Counsel Michael Johnson, who is now a circuit judge, testified that he consulted mental health experts for evaluations of Hall as to competency prior to the resentencing and that he would have asked for a competency hearing if he believed that any expert would support an incompetency finding.

Dr. Harry Krop, a psychologist, testified that he evaluated Hall twice as a confidential expert at the request of defense counsel in March and September 1990, prior to resentencing, and found him to have an IQ of 73 and probable brain damage. Dr. [228] Krop opined that neither finding necessarily reflected upon the issue of Hall's competency. He further testified that Hall was taking antidepressant medication at the time of resentencing and had a schizophrenic personality disorder but that Hall nevertheless understood the situation and was competent to proceed to resentencing. Dr. Jethro Toomer, a psychologist, testified that he had evaluated Hall in August 1988 as to potential mental health mitigation, but not as to competency, and found Hall's IQ to be sixty and his mental age to be thirteen. Dr. Toomer testified that he would find it unlikely that someone who is mentally retarded would meet the criteria for competency but that he was never asked to evaluate Hall as to competency at the time of resentencing and

that he could not render such an opinion at the evidentiary hearing. Dr. Alfred Fireman, a psychiatrist, testified as to potential effects of prescription drugs but stated that he had never met or evaluated Hall and could not offer an opinion as to his competency. Dr. Mark Zimmerman, a psychologist, testified that he had evaluated Hall in 1995, at the request of defense counsel, and found that Hall's IQ was 74 and that he was mentally retarded and brain damaged but that Dr. Zimmerman was not asked to express an opinion as to competency. Dr. Zimmerman stated at the hearing that he believed Hall was incompetent at the time of his interview in 1995 but that he could not determine whether Hall was competent at resentencing in 1990.

The State introduced into evidence copies of Hall's inmate medical records from the Marion County Jail. The State also called as a witness Hall's additional resentencing defense counsel, Michael Graves, who testified that all of Hall's defense counsel had concerns during the resentencing as to Hall's competency but that Hall seemed to understand the proceedings and was able to converse as to defense strategy.

In its final order following the evidentiary hearing, the circuit court found in relevant part:

> The evidence adduced during the evidentiary hearing on August 25, 1997, generally established that Defendant Hall possesses a variety of mental health deficits that have been diagnosed, and treated, by a plethora of mental health professionals since 1978. The testimony of Defendant Hall's resentencing counsel established that each member of his defense team was completely aware of Defendant Hall's mental condition and his mental history. De-

fendant Hall's competence was a matter that each member of his resentencing defense team actively monitored as a result of their own interactions with Defendant Hall and with the experts who had evaluated him prior to the resentencing hearing. The subject of Defendant Hall's competence to proceed to the resentencing hearing was regularly discussed amongst the defense team themselves and was regularly discussed with the experts who had been appointed by this Court.

This Court was the same Court that presided over Defendant in the resentencing hearing in 1990. This Court had the opportunity then, and at numerous hearings since, [to] observe and listen to the comments of the Defendant, and observe the interactions and interplay between counsel for the Defendant and the Defendant. The Court gives great weight to its opportunity to personally observe the Defendant in these proceedings, and to have the opportunity for the Defendant to speak to the Court in these various proceedings.

The Defendant was represented at the resentencing hearing by not one, not two, but three very competent, experienced, criminal defense attorneys. All three attorneys were extremely knowledgeable in criminal defense work at the time of resentencing, and were among the most experienced and able attorneys in this portion of central Florida at that [229] time. All had considerable experience with death cases. All three continue to prosper in their legal careers, one having become a Circuit Court Judge, one having gone into private

practice in criminal defense work, and the other being the most experienced attorney on the Public Defender's staff in the Fifth Judicial Circuit.

The Court has carefully considered all of the testimony received at the evidentiary hearing. While there is no doubt that the Defendant has serious mental difficulties, is probably somewhat retarded, and certainly has learning difficulties and a speech impediment, the Court finds that the Defendant was competent at the resentencing hearings. The Court acknowledges that on this issue that reasonable minds may differ. In fact, there is a dispute in the evidence. Nevertheless, considering all of the evidence presented, including the Court's own knowledge of what occurred at the resentencing hearing, including the Court's own knowledge of what was presented at the resentencing hearing by way of evidence, knowing the Defendant's involvement in the actual carrying out of the crime, and being otherwise advised in the premises, the Court believes that its ruling that the Defendant was competent at the time of resentencing is correct, at least by the greater weight of the evidence. The most substantial, competent evidence brought to bear on the issue supports this conclusion.

Furthermore, the experienced defense counsel for Mr. Hall at resentencing were very aware of his health issues and concerns. The defense availed themselves of numerous experts to evaluate the Defendant's mental status. Defense counsel were well aware of their ethical and legal obligations in regard to the is-

sues concerning Mr. Hall's competence in regard to the resentencing hearing. Defense counsel were in continuous contact with Mr. Hall, as they had arranged for Mr. Hall to be incarcerated locally during the proceeding. This Court has no doubt that should these experienced, competent counsel have any qualms as to whether or not Mr. Hall was legally competent to proceed at resentencing, that they would have brought this issue to the Court's attention in the appropriate manner. Accordingly, this Court finds absolutely no credibility to the claims of the Defendant that defense counsel were ineffective in any significant way in their alleged failure to bring the issues of the Defendant's alleged competency or not to the Court's attention at resentencing.

The testimony of the mental health experts offered during the evidentiary hearing wholly failed to establish that Defendant Hall was incompetent to proceed to the resentencing hearing in 1990. One of the experts opined that he believed that Defendant Hall was legally incompetent at the time of his evaluation in 1995, but could not render an opinion as to Defendant Hall's competence in 1990. The only expert who testified during the evidentiary hearing who *did* have an opinion regarding Hall's competence relevant to the resentencing hearing, Dr. Harry Krop, indicated that Hall was legally competent. Nothing has been demonstrated by the Defendant that undermines this Court's confidence in the outcome of the resentencing proceeding. The Court believes the Defendant received a very fair resentencing hearing.

> In sum, Defendant Hall has failed to establish, by any legal standard even arguably applicable to a post-conviction motion, that he was incompetent to proceed at the resentencing hearing. To the extent Defendant Hall alleges ineffective assistance of counsel as an element of the instant sub-claim, he has similarly failed to establish that the sub-claim has legal or factual merit.

Final Order at 18-20.

Hall argues that the circuit court failed to properly consider Hall's mental retarda- **[230]** tion and erred in failing to set forth specific findings as to Hall's competency under the factors provided in Florida Rule of Criminal Procedure 3.211(a)(2). These arguments have no merit. As noted above, the court considered all of the evidence presented by Hall and the State as to Hall's mental retardation. In its postconviction order, as we have previously noted, the court specifically found that Hall "is probably somewhat retarded."

The record reflects that, prior to his original trial in 1978, Hall was found competent to stand trial. As detailed in the final postconviction order below, the circuit judge found no reason during the resentencing to believe that Hall did not remain competent in 1990 to proceed to the resentencing. Furthermore, defense counsel did not request a competency hearing. Thus, the judge had no obligation under *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966), or Florida Rule of Criminal Procedure 3.210(b)[2] to order a compe-

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[2] Florida Rule of Criminal Procedure 3.210(b) provides in relevant part:

tency hearing and make a judicial competency determination prior to the resentencing or the postconviction proceeding.

Accordingly, we conclude that the circuit judge held a full and fair evidentiary hearing as to Hall's competency claims in which he heard testimony from all relevant defense counsel and from four mental-health experts. All discussed Hall's mental retardation and expressed an understanding of the standard for finding a defendant competent, which requires that he or she be able to understand the nature of the proceedings and to confer with counsel. *See* Fla. R.Crim. P. 3.211(a) (codifying *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960)). Although the witnesses expressed concerns as to Hall's mental condition, none of the three defense counsel testified in the evidentiary hearing that he or she believed Hall was incompetent to be resentenced. One of the mental health experts, Dr. Krop, opined that Hall was competent to stand resentencing. None of the other three mental health experts expressed any conclusion as to Hall's competency for resentencing.

The circuit judge stated in his order that he relied upon all of the foregoing testimony and documentary evidence as well as his own observations of Hall in presiding over the resentencing to arrive at his determination that Hall was competent to be resentenced. The

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If, at any material stage of a criminal proceeding, the court of its own motion, or on motion of counsel for the defendant or for the state, has reasonable ground to believe the defendant is not mentally competent to proceed, the court shall immediately enter its order setting a time for a hearing to determine the defendant's mental condition....

record reflects that competent, substantial evidence supports the circuit court's conclusion that Hall was competent at the time of his resentencing. It is the duty of the trial court to determine what weight should be given to conflicting testimony. *Mason v. State*, 597 So.2d 776, 780 (Fla.1992). Based upon the circuit court's factual findings and the relevant case law, we affirm the circuit court's ruling on this claim.

Accordingly, we affirm the circuit court's order denying Hall's rule 3.850 motion.

It is so ordered.

HARDING, C.J., and SHAW, WELLS, PARIENTE and LEWIS, JJ., concur.

ANSTEAD, J., concurs specially with an opinion, in which PARIENTE, J., concurs.

QUINCE, J., recused.

ANSTEAD, J., specially concurring.

Although it appears that the majority opinion is technically correct in its assessment of the procedural bars invoked against Hall's present claims, I write separately to express my agreement with Chief Justice Barkett's dissenting opinion in our [231] earlier review of Hall's case explaining why the execution of the mentally retarded violates the Florida Constitution's bar against cruel or unusual punishment. *See Hall v. State*, 614 So.2d 473 (Fla.1993) (Barkett, C.J., dissenting).

Justice Barkett first succinctly outlined the evidence concerning Hall's retardation:

> The testimony reflects that Hall has an IQ of 60; he suffers from organic brain damage, chronic psychosis, a speech impediment, and a

learning disability; he is functionally illiterate; and he has a short-term memory equivalent to that of a first grader. The defense's four expert witnesses who testified regarding Hall's mental condition stated that his handicaps would have affected him at the time of the crime. As the trial judge noted in the resentencing order, Freddie Lee Hall was "raised under the most horrible family circumstances imaginable."

Indeed, the trial judge found that Hall had established substantial mitigation. The judge wrote that the evidence conclusively demonstrated that Hall "may have been suffering from mental and emotional disturbances and may have been, to some extent, unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." Additionally, the judge found that Hall suffers from organic brain damage, has been mentally retarded all of his life, suffers from mental illness, suffered tremendous emotional deprivation and disturbances throughout his life, suffered tremendous physical abuse and torture as a child, and has learning disabilities and a distinct speech impediment that adversely affected his development.

Hall's mental deficiency as an adult is not surprising. The sixteenth of seventeen children, Hall was tortured by his mother and abused by neighbors. Various relatives testified that Hall's mother tied him in a "croaker" sack, swung it over a fire, and beat him; buried him in the sand up to his neck to "strengthen his legs"; tied his hands to a rope that was attached to a ceiling beam and beat him while he

> was naked; locked him in a smokehouse for long intervals; and held a gun on Hall and his siblings while she poked them with sticks. Hall's mother withheld food from her children because she believed a famine was imminent, and she allowed neighbors to punish Hall by forcing him to stay underneath a bed for an entire day.
>
> Hall's school records reflect his mental deficiencies. His teachers in the fourth, sixth, seventh, and eighth grades described him as mentally retarded. His fifth grade teacher stated that he was mentally maladjusted, and still another teacher wrote that "his mental maturity is far below his chronological age."

614 So.2d at 479-80. With that factual background in place, Justice Barkett then explained her agreement with the holdings of the Georgia Supreme Court[3] and other jurisdictions barring the execution of the mentally retarded:[4]

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[3] The Georgia Supreme Court in *Fleming v. Zant*, 259 Ga. 687, 386 S.E.2d 339 (1989), explained:

> The "standard of decency" that is relevant to the interpretation of the prohibition against cruel and unusual punishment found in the Georgia Constitution is the standard of the people of Georgia, not the national standard. Federal constitutional standards represent the minimum, not the maximum, protection that this state must afford its citizens. Thus, although the rest of the nation might not agree, under the Georgia Constitution, the execution of the mentally retarded constitutes cruel and unusual punishment.

386 S.E.2d at 342 (citation omitted).

[4] Justice Barkett also noted the evolution of attitudes toward mental retardation:

[232] This Court has not addressed whether executing the mentally retarded is cruel or unusual pun-

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Floridians' attitudes toward the mentally retarded have evolved significantly in recent decades. Those mentally retarded people committed to state care no longer are warehoused in "training centers," and a variety of procedural safeguards have been enacted to protect the rights of those committed to state facilities. *See* § 393.11, Fla.Stat. (1991) (regulating involuntary admission of the mentally retarded to state residential services); *see also* David A. Davis, *Executing the Mentally Retarded*, Fla.Bar J., February 1991, at 13, 15 (discussing generally how statutes have changed to reflect a more enlightened approach to caring for the mentally retarded).

Society has developed a greater understanding of mental retardation. It is generally recognized now that mental retardation is a permanent learning disability that manifests itself in several predictable ways, including poor communication skills, short memory, short attention span, and immature or incomplete concepts of blameworthiness and causation. Davis, Fla.Bar J. at 13; *see also* James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo.Wash.L.Rev. 414, 417 (1985); John Blume & David Bruck, *Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis*, 41 Ark.L.Rev. 725, 732-34 (1988). A person who is mentally retarded is not just "slower" than the average person. Mental retardation is "a severe and permanent mental impairment that affects almost every aspect of a mentally retarded person's life." Blume & Bruck, 41 Ark.L.Rev. at 734.

It would appear that the trial judge did not understand the nature of mental retardation. Otherwise, he could not have reached the conclusion that the mitigating factors were entitled to little weight because he could not "definitely establish that they affected Hall at the time of the crime."

Hall, 614 So.2d at 480-81.

ishment under article I, section 17 of the Florida Constitution. I believe it is appropriate to analyze whether imposition of capital punishment in such circumstances is either "cruel" or "unusual." First, because a mentally retarded person such as Freddie Lee Hall has a lessened ability to determine right from wrong and to appreciate the consequences of his behavior, imposition of the death penalty is excessive in relation to the crime committed. *Coker v. Georgia*, 433 U.S. 584, 592, 97 S.Ct. 2861, 2866, 53 L.Ed.2d 982 (1977). As Justice Brennan noted in *Furman v. Georgia*, 408 U.S. 238, 257, 92 S.Ct. 2726, 2736, 33 L.Ed.2d 346 (1972) (Brennan, J., concurring), a punishment is excessive when it is unnecessary. An excessive punishment "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering." *Coker*, 433 U.S. at 592, 97 S.Ct. at 2866 (discussing *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)). I believe imposing the death penalty on mentally retarded defendants is excessive, serves no purpose except to dispose of those some might deem to be "unacceptable members" of society, and therefore, is "cruel."

Second, executing a mentally retarded defendant such as Hall is "unusual" because it is disproportionate. Because mentally retarded individuals are not as culpable as other criminal defendants, I would find that the death penalty is always disproportionate when the defendant is proven to be retarded. However, even without a per se rule, Hall's mental retardation and his horrible childhood represent substantial mitigation, which makes the death penalty disproportionate despite the existence of several aggravating factors. *See, e.g., Nibert v. State*, 574 So.2d 1059, 1063 (Fla.1990); *Smalley v. State*, 546 So.2d 720 (Fla.1989); *Blakely v.*

State, 561 So.2d 560 (Fla.1990). This case is illustrative of far too many cases we see at this Court; horrible crimes are repeatedly committed by those who endure sickening abuse and deprivation as children. Many, like Freddie Lee Hall, are also mentally retarded and suffer particularly severe abuse because their parents do not understand the nature of retardation. The connection between an individual's childhood and his or her later ability to function as a productive member of society is obvious to those of us who routinely review criminal cases, and while a tragic childhood and mental [233] retardation do not "excuse" later criminal behavior, they do reflect on an individual's culpability.

Hall, 614 So.2d at 481.

Finally, Justice Barkett acknowledged that the crime involved herein was undoubtedly amongst those for which the death penalty was ordinarily reserved:

> The law requires that the death penalty be reserved for the most heinous of crimes and the most culpable of murderers. *See, e.g., Songer v. State*, 544 So.2d 1010, 1011 (Fla.1989); *State v. Dixon*, 283 So.2d 1, 8 (1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). The crime committed in this case undoubtedly was heinous. A young woman, seven months pregnant, was raped, beaten, and shot to death. The horrible nature of this crime is uncontroverted, and it is certainly among the types of offenses for which the death penalty may be imposed. However, Freddie Lee Hall is not among the most culpable of murderers. Hall's judgment, thought processes, and actions are unquestionably affected by his mental retardation. He cannot understand right from wrong

> in the way that most members of our society do, and while he should spend the rest of his life in prison, he should not be executed.

Hall, 614 So.2d at 481-82. I fully concur in Justice Barkett's observations and analysis, including her evaluation of the heinous nature of the crime involved. Further, it is important to note that Hall did not actually kill the victim. Rather, his codefendant, Ruffin, was the actual killer. *See id.* at 478. It should also not go unnoticed that the actual killer, Ruffin, received a life sentence while Hall was sentenced to death. *See id.* at 479.

PARIENTE, J., concurs.

IN THE CIRCUIT COURT OF THE
FIFTH JUDICIAL CIRCUIT IN AND FOR
HERNANDO COUNTY, FLORIDA

No. 1978-CF-0052

STATE OF FLORIDA

v.

FREDDIE LEE HALL,

Defendant.

[stamps illegible]

[1]

*AMENDED[1] ORDER DENYING DEFENDANT'S SUCCESSIVE MOTION UNDER FLORIDA RULES OF CRIMINAL PROCEDURE 3.851 AND 3.203, BARRING EXECUTION OF THE DEFENDANT DUE TO MENTAL RETARDATION

In this Order, references to the Transcript of the December 7 and 8 Evidentiary Hearing will be denoted by the letter R, followed by the page number(s).

[1] Amended Order pursuant to Attorney Tatti's correspondence dated May 27, 2010 in reference to Dr. Mosman's report stated in Paragraphs 18 and 19. In paragraphs 18 and 19 of the Circuit Court's original order dated May 21, 2010, the Court errantly states that the Defendant failed to provide the State with a copy of Dr. Mosman's report pursuant to the Court's February 1, 2005, *Order to Compel*. This order amends that language to state that the Defendant failed to provide the raw data and testing materials underlying Dr. Mosman's report, not the report itself.

THIS CAUSE comes before this Court on Defendant's "Successive Motion Pursuant to Florida Rules of Criminal Procedure 3.851 and 3.203, Barring Execution of the Defendant Due to Mental Retardation," and this Court, having conducted a full evidentiary hearing on the matter on December 7 and 8, 2009, and having reviewed the file, the Defendant's Motion, the State's Response to Defendant's Successive Motion, considered the transcript of the evidentiary hearing, conducted independent research and being fully advised in the premises hereby finds as follows:

1. On February 21, 1991, Defendant was sentenced to death for first degree murder. Defendant's sentence was affirmed by the Florida Supreme Court. *See Hall v. State*, 614 So.2d 473 (Fla. 1993).

2. On November 20, 2004, Defendant filed the instant motion, "Successive Motion Pursuant to Florida Rules of Criminal Procedure 3.851 and 3.203, Barring Execution of the Defendant Due to Mental Retardation." Attached to Defendant's Motion was a Confidential Evaluation of Defendant conducted by Dr. Gregory A. Prichard. In support of its motion, Defendant relies on *Atkins v. Virginia*, 536 U.S. 304; 122 S.Ct. 2242 (U.S. [2] 2002). In *Atkins*, the United States Supreme Court held that it was unconstitutional and in derogation of the Eighth Amendment of the United States Constitution, for a mentally retarded individual to be executed. *Atkins*, 536 U.S. at 321; 122 S.Ct. at 2252. However, the Supreme Court cautioned "we leave to the State[s] the task of developing appropriate ways to enforce the constitutional re-

striction upon [their] execution of sentences." *Atkins*, at 405, 416-417; 106 S.Ct. 2595.

3. On December 15, 2004, the State of Florida filed its, "Response to Successive Motion Pursuant to Florida Rules of Criminal Procedure 3.851 and 3.203" and a "Motion to Compel and Motion for Appointment of Expert Witness."

4. On or about February 1, 2005, the Court granted the State's "Motion to Compel" and ordered Defendant to provide the State with (1) copies of any and all raw data and notes associated with the psychological evaluation/assessment of the Defendant by Dr. Gregory Prichard, including any and all psychological tests and answer sheets; (2) copies of any and all written or recorded material provided by the Defendant to Dr. Prichard or independently obtained by or on behalf of Dr. Prichard; and (3) copies of any and all psychological or psychiatric reports provided to Dr. Prichard, including testing material, raw data and notes associated with the said reports, and including any and all reports which are not specifically referenced in Dr. Prichard's report.

5. On or about December 2, 2009, the State of Florida filed a "Motion in Limine" in which the State sought to limit the Defendant's presentation of evidence in light of Florida Statute §921.137, subsection (1), and governing case law interpreting the Statute. In *Cherry v. State*, the Florida Supreme Court held that because "Cherry does not meet the first prong of the section 921.137(1) criteria, we do not consider the two other prongs of the mental retar-

dation determination." *Cherry v. State*, 959 So.2d 702, 713 (Fla. 2007). In light of *Cherry*, the State asked that the Court limit the Defendant's presentation of evidence by requiring Defendant to first prove the first component of his mental retardation claim, a significant subaverage general intellectual functioning.

6. On December 7, 2009, Defendant filed a response to the State of Florida's *Motion in Limine*.

7. On December 7 and 8, 2009, the Court held a two day evidentiary hearing on Defendant's motion, *Successive Motion Pursuant to Florida Rules of Criminal Procedure 3.851 and 3.203, Barring Execution of the Defendant Due to Mental* [3] *Retardation*.

8. Florida Statute §921.137, subsection (1) states: "the term 'mental retardation' means significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age." In interpreting the Statute, the Florida Supreme Court established a three pronged, conjunctive test where a defendant must prove each prong by clear and convincing evidence in order to prevail on a claim of mental retardation. *Jones v. State*, 966 So.2d 319, 325 (Fla. 2007); *see also Burns v. State*, 944 So.2d 234, 245 (Fla. 2006).

9. In *Jones*, the Florida Supreme Court held that a diagnosis of mental retardation requires three findings: (1) significantly subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) onset of

the condition before age 18. *Jones*, 966 So.2d at 325.

10. The Florida Supreme Court has interpreted the first component (*i.e.* a significant subaverage general intellectual functioning) of a mental retardation claim to mean that a defendant must show an IQ score of 70 or below in order to show a significantly subaverage general intellectual functioning. *Cherry v. State*, 959 So.2d at 713; *see also Zack v. State*, 911 So.2d at 1201 (Under Florida law, one of the criteria to determine if a person is mentally retarded is that he or she has an IQ of 70 or below.)

11. In *Cherry*, the Florida Supreme Court affirmed the lower court's holding that denied Defendant's mental retardation claim under Fla. Stat. §921.137(1) when Defendant failed to submit an IQ score that was 70 or lower. In affirming the lower court, the Florida Supreme Court held that because Cherry "does not meet the first prong of the section 921.137(1) criteria, we do not consider the two other prongs of the mental retardation determination." *Cherry v. State*, 959 So.2d at 713.

12. Upon considering the State's *Motion in Limine* and the Defendant's response to the State's Motion, and after considering Florida Statute §921.137, Florida Rule of Criminal Procedure Rule 3.203, and the governing case law applicable to the Statute and Rule, the Court granted the State's *Motion in Limine* at the outset of the evidentiary hearing of December 7, 2009 (R. 32).

13. In granting the State's *Motion in Limine*, the Court ordered the Defendant to first provide clear and convincing evidence in support of component (1) one (*i.e.* significant subaverage general intellectual functioning) of his mental retardation claim before [4] offering any evidence in support of the second (*i.e.* concurrent deficits in adaptive behavior) and third (*i.e.* onset of the condition before age 18) components of his mental retardation claim. (R. 31-32). Under the guidance of *Cherry*, the Court reasoned that a determination of whether the Defendant has met the second and third components of his mental retardation claim would be legally insufficient if the Defendant has failed to meet the first component (*i.e.* significant subaverage general intellectual functioning) of his mental retardation claim, since each component of a mental retardation claim must be established by clear and convincing evidence. *Nixon v. Florida*, 2 So.3d 137, 143 (Fla. 2009); § 921.137(1), Fla. Stat. (2007); Fla. R.Crim. P. 3.203(b).

14. During the course of the evidentiary hearing of December 7 and 8, 2009, the Defendant called a number of witnesses. Defendant's first witness was Dr. Valerie McClain. Dr. McClain testified that she did not obtain an I.Q. measurement from the Defendant, nor did she provide any testimony regarding the Defendant's I.Q. The Defendant's second witness was Lugene Ellis, a half-brother of the Defendant. Mr. Ellis testified regarding his recollection of the Defendant as a child but did not provide any quantitative testimony regarding the Defendant's I.Q. The

Defendant's next witness was James Hall, a brother of the Defendant. Mr. Hall testified about the Defendant's problems with reading, writing, and caring for himself, but did not provide any quantitative testimony regarding the Defendant's I.Q.

15. On the second day of the evidentiary hearing, the Defendant called his final two witnesses. Defendant's first witness that day was Dr. Harry Krop. Dr. Krop testified that he conducted a confidential mental health evaluation of the Defendant in September of 1990, prior to the Defendant's resentencing proceeding. In preparation of the Defendant's September of 1990 evaluation, Dr. Krop testified that he reviewed multiple reports from a number of doctors, numerous witness affidavits, legal documents, police reports, school records, and prison reports all relating to the Defendant. (R. 110). In addition, Dr. Krop testified that he spoke with several members of the Defendant's family. In that same year, Dr. Krop testified that he administered the *Wechsler Adult Intelligence Scale Revised* to the Defendant and obtained an I.Q. score of seventy-three (73). (R. 120). Furthermore, Dr. Krop testified on cross-examination that he examined a report generated by Marilyn Feldman that indicated Feldman administered the *Wechsler Adult Intelligence Scale Revised* to the Defendant and obtained an I.Q. score of eighty [5] (80), in 1986. (R. 128).

16. The Defendant's final witness was Dr. Gregory Prichard. Dr. Prichard evaluated the Defendant on August 14 and 15, 2002 for a determina-

tion of mental retardation. In compliance with Florida Rule of Criminal Procedure Rule 3.203(c)(2), Defendant attached Dr. Gregory Prichard's report, styled *Confidential Assessment*, to the subject motion. Dr. Prichard testified that on August 15, 2002, he administered the *Wechsler Adult Intelligence Scale Third Edition* to the Defendant and determined that the Defendant's I.Q. score was seventy-one (71). (R. 218). In addition to administering the *Wechsler Adult Intelligence Scale Third Edition*, Dr. Prichard also administered the *Vineland Adaptive Behavior Scales* and the *Wide Range Achievement Test.* (R. 215).

17. During the course of the Defendant's two-day evaluation, Dr. Prichard also reviewed a vast amount of information and reports relating to the Defendant. Dr. Prichard examined reports from a number of doctors and researchers of which one, a report generated by Dr. Bill E. Mosman, was of particular significance to the Defendant. The Defendant attempted to introduce a report generated by a Dr. Bill E. Mosman through the testimony of Dr. Prichard on direct examination. (R. 162). Dr. Mosman's November 19, 2001 report indicated that the Defendant obtained an I.Q. score of sixty-nine (69), using the *Wechsler Adult Intelligence Scale Third Edition.* Importantly, Dr. Mosman's report lacked critical detail and information indicating how he obtained Defendant's intelligence quotient of sixty-nine (69). In particular, Dr. Mosman's report lacked discussion as to the testing instrument he used and how he used it in evaluating the Defendant,

lacked discussion regarding the raw data that Dr. Mosman may have complied and examined in evaluating the Defendant, and lacked discussion on any other notes that may have related to Dr. Mosman's evaluation of the Defendant. (R. 162).

18. Upon the State's objection of the Defendant's attempt to introduce Dr. Mosman's report through the testimony of Dr. Prichard, the Court determined that Dr. Mosman's report did not constitute competent evidence and therefore, was ruled as inadmissible evidence. In support of its determination, the Court found that the Defendant violated the Court's February 1, 2005 *Order to Compel* by not providing the State with the testing materials and raw data underlying Dr. Mosman's report. (R. 162). Specifically, the Court's *Order to Compel* ordered the Defendant to provide the State with (1) copies of any and all raw data and notes associated with the psychological [6] evaluation/assessment of the Defendant by Dr. Gregory Prichard, including any and all psychological tests and answer sheets; (2) copies of any an all written or recorded material provided by the Defendant to Dr. Prichard or independently obtained by or on behalf of Dr. Prichard; and (3) copies of any and all psychological or psychiatric reports provided to Dr. Prichard, including testing material, raw data and notes associated with the said reports, and including any and all reports which are not specifically referenced in Dr. Prichard's report. (Order dated February 1, 2005).

19. The Court found that the Defendant's failure to furnish the State with the raw data and testing materials underlying Dr. Mosman's report pursuant to the Court's Order, was highly prejudicial and unfair to the State. (R. 162). Moreover, the Court determined that the prejudice and unfairness to the State could not be cured by the Defendant because Dr. Mosman was unavailable for cross-examination (Dr. Mosman was deceased), and neither the Defendant nor Dr. Prichard had the raw material that Dr. Mosman may have used in his evaluation of the Defendant. Without access to the test instrument or raw material that Dr. Mosman may have used, the State could not test the validity of Dr. Mosman's results through the use of its own hired expert. (R. 162). For these reasons, and because the Defendant failed to comply with the Court's February 1, 2005 *Order to Compel*, the Court excluded Dr. Mosman's report from evidence. However, the Court allowed the Defendant to proffer Dr. Mosman's report on record through Dr. Prichard's testimony.

20. During the course of the hearing, it became apparent that the Defendant could not provide clear and convincing evidence that would satisfy the first prong (*i.e.* significant subaverage general intellectual functioning) of its mental retardation claim. In effect, the Defendant was unable to show substantial competent evidence that indicated an I.Q score of 70 or lower. Dr. Prichard's report indicated an I.Q. score of seventy-one (71). (R. at 180). Aside from Dr. Mosman's report, the other reports that Dr.

Prichard examined all revealed I.Q. scores of 71 or greater. Dr. Prichard testified that he reviewed the following reports that made record of Defendant's I.Q.: Beta Test administered by Department of Corrections in December of 1968: 76 I.Q.; Kent Test administered by Department of Corrections in January of 1979: 79 I.Q.; WAIS-R administered by Marilyn Feldman on September 10, 1986: 80 I.Q.; WAIS-R administered by Dr. Krop in March 1990: 73 I.Q.; WAIS-IV administered by Dr. Sesta [7] on November 25, 2008: 72 I.Q.

21. Because the Defendant failed to provide clear and convincing evidence that would show a significant subaverage general intellectual functioning, the Defendant's claim of mental retardation under Florida Statute §921.137 and Florida Rule of Criminal Procedure 3.203, fails as a matter of law. Even if Dr. Mosman's report were to be admitted into evidence, it would be an aberration amid all the other I.Q. results that have a score of 71 or higher. One single I.Q. result that falls one point below 70, in contrast to all of the other I.Q. tests showing an I.Q. greater than 70, would not meet the clear and convincing evidence threshold that both the Statute and the Rule require.

22. The Florida Supreme Court has made clear that all three prongs of a mental retardation claim must be met with clear and convincing evidence. *See Burns v. State*, 944 So.2d 234, 249 (Fla. 2006); *Jones v. State*, 966 So.2d 319, 325 (Fla. 2007); Florida Statute §921.137(4). "Thus, lack of proof on any one of these components of mental retardation would result in the

defendant not being found to suffer from mental retardation." *Nixon v. Florida*, 2 So.3d 137, 143 (Fla. 2009). At this point, the Defendant's mental retardation claim fails as a matter of law since the Defendant has failed to proffer evidence that would meet the first prong (*i.e.* significantly subaverage general intellectual functioning) of his mental retardation claim. However, in the abundance of caution, the Court will examine the Defendant's evidence proffered in support of the second (*i.e.* concurrent deficits in adaptive behavior) and third (*i.e.* onset of the condition before age 18) prongs of his mental retardation claim.

23. The Florida Supreme Court has held, "defendants claiming mental retardation are required to show that their low IQ is accompanied by deficits in adaptive behavior." *Phillips v. State*, 984 So.2d 503, 510 (Fla. 2008), *citing Rodriguez v. State*, 919 So.2d at 1252, 1266 (Fla.2005). ("[L]ow IQ does not mean mental retardation. For a valid diagnosis of mental retardation ... there must also be deficits in the defendant's adaptive functioning." (quoting trial court's order)). "Adaptive functioning refers to how effectively individuals cope with common life demands and 'how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting.' " *Rodriguez*, 919 So 2d at 1266 n. 8. Furthermore, the Florida Supreme Court has held retrospective diagnosis insufficient to satisfy the adaptive functioning component of the mental retardation definition. In [8] *Philips*, the Court stated,

"the statute and the rule require significantly subaverage general intellectual functioning to exist *concurrently with* deficits in adaptive behavior. *Phillips*, 984 So.2d at 510, *citing Jones v. State*, 966 So.2d at 325-327, *citing* § 921.137(1), Fla. Stat. (2007); Fla. R.Crim. P. 3.203(b).

24. In *Philips*, the Florida Supreme Court held that the Defendant failed to demonstrate deficits in adaptive functioning that exist concurrently with his significant subaverage general intellectual functioning. *Philips*, 984 So.2d at 511. The Florida Supreme Court stated that while Philips had an IQ of 70 in 2000, "his adaptive functioning was assessed by evaluating his behavior at or around age eighteen." *Id.* at 508. The Court determined this technique, conducted by Philips' only defense expert, Dr. Keyes, to be a retrospective diagnosis, and "insufficient to satisfy the second prong of mental retardation definition." *Id.* at 511, citing *Jones*, 966 So.2d at 325-27.

25. As in *Philips*, in the instant case the Defendant's expert witness, Dr. Prichard, also utilized a retrospective technique in ascertaining Hall's adaptive functioning. Dr. Prichard testified that he made no attempt to determine Hall's level of *present* adaptive functioning at the time he administered the WAIS-III in August of 2002. (emphasis added) (R. 260, 284). Dr. Prichard evaluated the Defendant's sister, Deana Rigsby, and the Defendant's brother, James Hall (R. 236, 239). Dr. Prichard also examined a number of past reports from doctors who have evaluated the Defendant in the past.

(R. 241-246). While the Defendant's evidence may yield some support in showing deficits in Defendant's adaptive functioning prior to 2002, the Defendant fails to provide any evidence that shows a *concurrent*, that is, a present deficit in his adaptive functioning.

26. Since the Defendant has been incarcerated in the Department of Corrections since 1978, the logical and necessary inquiry to determine "concurrent" deficits in adaptive functioning would have been to interview correction officers or classification officers, or perhaps, to review records documenting the Defendant's existence and interactions while in the custody of the Department of Corrections. Dr. Prichard concedes as much, stating, "I have done adaptive behavior testing with prison guards before, current adaptive testing. I didn't do it in this case. I don't know why I didn't do it...But I did not interview a Department of Corrections person." (R. 280). In effect, Dr. Prichard engaged in a retrospective diagnosis in determining the Defendant's deficits in adaptive functioning, much like the approach employed by the expert witness in *Philips*. As the [9] Florida Supreme Court in *Philips* held, "a retrospective diagnosis is insufficient to satisfy the second prong of mental retardation definition." *Phillips*, 984 So.2d at 510, *citing Jones*, 966 So.2d at 325-327.

27. Florida Statute and Rule each make clear that a Defendant must prove each of the three components of a mental retardation claim by clear and convincing evidence. Fla. Stat. 921.137(1)(4); Fla. R.Crim. P. 3.203(b). Thus

far, the Defendant has failed to provide any clear and convincing evidence that would meet either of the first two required components of his mental retardation claim. Therefore, as a matter of law, the Defendant's mental retardation claim fails. However, in the abundance of caution, this Court will proceed and consider whether the Defendant has proffered any evidence in support of the third prong of his mental retardation claim (*i.e.* the onset of the first two components occurring prior to the age of 18).

28. Specifically, the third component of a mental retardation claim requires that the onset of the Defendant's alleged significant subaverage intellectual functioning and deficits in concurrent adaptive functioning manifest prior to the age of 18. *See* Fla. Stat. 921.137(1); Fla. R.Crim. P. 3.203. In effect, the third component requires a retrospective assessment in order to determine whether the first two components have manifested prior to the Defendant reaching the age of 18. In support of the third component of his mental retardation claim, the Defendant proffered testimony from two of his siblings, Lugene Ellis and James Hall. While each of them testified to the Defendant's various problems of adaptive functioning as a child and young adult, neither of these witnesses testified specifically about the Defendant's I.Q. The Defendant also relied on Dr. Prichard's testimony to support the third prong of his mental retardation claim, but Dr. Prichard also did not have any quantitative evidence regarding the Defendant's I.Q prior to the age of 18. (R. 219). Dr. Prichard testified that the first I.Q. result

of the Defendant was obtained in December of 1968, several years after the Defendant had turned 18 years of age. In that year, the Department of Corrections administered the Beta Test to the Defendant and obtained a score of 76. (R. at 268). In addition, Dr. Prichard testified that he took note of the Defendant's school reports from the years of 1952 to 1961 and testified that each school report indicated cognitive and learning deficiencies. (R.218-219). However, Dr. Prichard testified that none of these school reports indicated a specific I.Q. test result. (R. 218).

[10]

29. While the evidence from the Defendant's siblings and Dr. Prichard in support of the third component of the Defendant's mental retardation claim may yield some support towards the Defendant in showing deficits in adaptive behavior prior to the age of 18, this evidence does not necessarily meet the clear and convincing threshold stated within the Statute. *See* Fla. Stat. 921.137(1)(4) Irrespective of whether the Defendant's evidence shows deficits in adaptive behavior prior to the age of 18, the third component also requires that the Defendant provide clear and convincing evidence that his I.Q. score measured 70 or below prior to the age of 18. This the Defendant has not shown. The Defendant has failed to provide any clear and convincing evidence that his I.Q. score was measured at 70 or below prior to 18 years of age. Incidentally, even if the Court were to apply the more lenient preponderance of the evidence standard to the Defendant's evidence,

the Defendant would still fail to meet either of the first two prongs of his mental retardation claim, based on the evidence.

30. Ultimately, the Defendant's mental retardation claim fails as a matter of law because the Defendant has failed to provide clear and convincing evidence that would meet any of the three components of a 3.851 mental retardation claim. As the Florida Supreme Court has made clear, "the lack of proof on any one of these components of mental retardation would result in the defendant not being found to suffer from mental retardation." *Nixon v. State*, 2 So.3d at 142.

With these findings, it is hereby

ORDERED AND ADJUDGED that Defendant's "Successive Motion to Florida Rules of Criminal Procedure 3.851 and 3.203, Barring Execution of the Defendant Due to Mental Retardation," is hereby **DENIED**.

Defendant shall have thirty (30) days from the date of this order to file an appeal.

DONE AND ORDERED in chambers, Hernando County, Florida, on this 8th day of June 2010.

/s/ Richard Tombrink Jr.

RICHARD TOMBRINK Jr.,
Circuit Court Judg3

SUPREME COURT OF FLORIDA

No. SC10-1335

FREDDIE LEE HALL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

December 20, 2012

[109 So. 3d 704]

* * *

[705]

PER CURIAM.

This case is before the Court on appeal of an order denying a motion to vacate a sentence of death under Florida Rule of Criminal Procedure 3.203. Because the order concerns postconviction relief from a sentence of death, this Court has jurisdiction of the appeal under article V, section 3(b)(1), Florida Constitution. For the reasons expressed herein, we affirm the order denying relief.

FACTS AND PROCEDURAL HISTORY

Freddie Lee Hall was tried and convicted in Putnam County for the 1978 murder [706] of Karol Hurst. *Hall v. State* (*Hall I*), 403 So.2d 1321, 1323 (Fla.1981). We upheld Hall's conviction and sentence on direct appeal. *Id.* at 1325.

On September 9, 1982, the governor signed Hall's first death warrant, effective for the week of October 1 through 8, 1982. *Hall v. State* (*Hall II*), 420 So.2d 872, 873 (Fla.1982). Hall filed a motion to vacate, a petition for writ of habeas corpus, and an application for a stay of execution, all of which were denied. *Id.* Hall then sought habeas corpus relief in the federal court, which was denied without an evidentiary hearing. *Hall v. Wainwright* (*Hall III*), 733 F.2d 766, 769 (11th Cir.1984), *cert. denied*, 471 U.S. 1107, 105 S.Ct. 2344, 85 L.Ed.2d 858 (1985). Hall appealed to the Eleventh Circuit Court of Appeals, which reversed in part and remanded for a hearing. *Id.* at 777 (finding that Hall was entitled to a hearing on the issues of his absence from the courtroom and whether he deliberately bypassed his ineffective assistance of counsel claim).

On remand, the district court again denied relief, finding that Hall's absences from trial occurred during non-critical stages and were therefore harmless, and that he deliberately bypassed the ineffective assistance of counsel claim. *Hall v. Wainwright* (*Hall IV*), 805 F.2d 945, 946 (11th Cir.1986), *cert. denied*, *Hall v. Dugger*, 484 U.S. 905, 108 S.Ct. 248, 98 L.Ed.2d 206 (1987). The Eleventh Circuit affirmed the denial. *Id.* at 948. Hall then petitioned this Court for habeas corpus relief based on the United States Supreme Court's ruling in *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) (holding that all mitigating factors, not just statutory mitigation, should be considered by the judge and jury). This Court held that any error in the sentencing was harmless. *Hall v. Dugger* (*Hall V*), 531 So.2d 76, 77 (Fla.1988).

The governor then signed a second death warrant on September 20, 1988. *Hall v. State* (*Hall VI*), 541 So.2d 1125, 1126 (Fla.1989). Hall filed his second 3.850

motion, alleging error under *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). The trial court found that this Court's ruling on the issue in *Hall V* was a procedural bar to Hall raising the claim again. *Hall VI*, 541 So.2d at 1126. We disagreed, stating that the "case involves significant additional non-record facts" that had not been considered on habeas review. *Id.* Ultimately, we determined that a *Hitchcock* error occurred, and that such error could not be considered harmless. *Id.* at 1128. We then vacated Hall's death sentence and remanded for a new sentencing proceeding. *Id.*

During the resentencing, the trial court found Hall mentally retarded as a mitigating factor and gave it "unquantifiable" weight. The court again condemned Hall to death, and we affirmed. *Hall v. State* (*Hall VII*), 614 So.2d 473, 479 (Fla.1993). Hall sought post-conviction relief, which was denied. *Hall v. State* (*Hall VIII*), 742 So.2d 225, 230 (Fla.1999). We affirmed the denial. *Id.* at 230. In finding that the trial court properly denied Hall's claim that the court erred in finding him competent to proceed at the resentencing, we stated "While there is no doubt that [Hall] has serious mental difficulties, is probably somewhat retarded, and certainly has learning difficulties and a speech impediment, the Court finds that [Hall] was competent at the resentencing hearings." *Id.* at 229.

After *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), was decided, Hall filed a motion to declare [707] section 921.137, Florida Statutes (2004),[1] unconstitutional. While the motion was

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[1] Section 921.137, Florida Statutes was enacted during a regular session of the Florida Legislature in 2001. *See* ch.2001-202, § 1, Laws of Fla. The statute has been amended once to transfer du-

pending, we adopted Florida Rule of Criminal Procedure 3.203 as a mechanism to file *Atkins* claims. Hall timely filed such a claim on November 30, 2004. No action was taken on the motion until, on March 27, 2008, Hall filed a motion to prohibit relitigation of the mental retardation issue, which was denied. The court then held an evidentiary hearing on Hall's successive motion to vacate his sentence.

At the evidentiary hearing held on December 7 and 8, 2009, Hall presented testimony from Dr. Valerie McClain, who testified that she did not obtain Hall's IQ; Lugene Ellis, Hall's half-brother, who testified about his recollection of Hall as a child; James Hall, Hall's brother, who testified regarding Hall's problems with reading, writing, and caring for himself; Dr. Harry Krop, who testified that Hall's IQ using the Wechsler Adult Intelligence Scale Revises was 73 and that a prior result on the same test given by Marilyn Feldman resulted in a score of 80; and Dr. Gregory Prichard, who testified that Hall scored a 71 on the Wechsler Adult Intelligence Scale Third Edition (WAIS-III). Hall sought to introduce a report compiled by then-deceased Dr. Bill Mosman through Dr. Prichard, but the court denied it and only allowed Hall to proffer the report for the record. After reviewing the evidence presented, the court determined that Hall could not meet the first prong of the mental retardation standard to establish his mental retardation—an IQ below 70. The court denied relief in an order issued May 26, 2010, and entered an amended order on June 16, 2010.

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ties from the Developmental Disabilities Program Office within the Department of Children and Family Services to the Agency for Persons with Disabilities. *See* ch.2006-195, § 23, Laws of Fla.

Hall appeals the court's denial, raising four claims: (1) the trial court's finding that Hall is not mentally retarded is not supported by competent, substantial evidence; (2) the trial court erred in granting the State's motion in limine that limited the evidence Hall could present on his mental retardation claim; (3) the trial court erred by striking Dr. Mosman's report; and (4) the trial court should have imposed a life sentence based on the doctrine of collateral estoppel. Because we find that there is competent, substantial evidence to support the court's finding that Hall is not mentally retarded, we affirm.

DISCUSSION

Hall asserts that he is mentally retarded pursuant to *Atkins*. Further, Hall alleges that his IQ should be read as a range of scores from 67 to 75 and that this Court's adoption of a firm cutoff of 70 or below to qualify as mentally retarded misapplies the Supreme Court's ruling in *Atkins* and fails to reflect an understanding of IQ testing. Hall contends that the appropriate standard would (a) include the standard error measurement (SEM), and (b) provide for a score band or range of scores. We recently declined to adopt this "range of scores" argument. *See Franqui v. State*, 59 So.3d 82 (Fla.2011). We again decline to adopt this line of reasoning. As we stated in *Franqui*:

> Nixon asserted, as does Franqui, that the Supreme Court in *Atkins* noted a consensus in the scientific community that a full scale IQ falling within a range of 70 to 75 meets the first prong of the test for mental retardation; therefore, Nixon contended, states must recognize [708] the higher cut-off IQ score of 75. *Nixon*, 2 So.3d at 142. We disagreed, reasoning that

> *Atkins* recognized a difference of opinion among various sources as to who should be classified as mentally retarded, and consequently left to the states the task of developing appropriate ways to enforce the constitutional restriction on imposition of the death sentence on mentally retarded persons. *Nixon*, 2 So.3d at 142.

Id. at 94 (citing *Nixon v. State*, 2 So.3d 137 (Fla.2009)).

Section 921.137, Florida Statutes (2012), prohibits the trial court from sentencing to death a mentally retarded defendant who is convicted of a capital felony. Section 921.137 provides the governing legal standard for such claims, and rule 3.203 outlines the procedural requirements. Both the statute and rule define the elements of a mental retardation claim as discussed in Atkins: (1) significantly subaverage general intellectual functioning, (2) existing concurrently with deficits in adaptive behavior, and (3) manifested during the period from conception to age eighteen. *See Atkins*, 536 U.S. at 318, 122 S.Ct. 2242; § 921.137(1), Fla. Stat. (2012); Fla. R.Crim. P. 3.203(b). Subsection (1) of the statute defines mental retardation as:

> significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities. The term "adaptive behavior," for the purpose of

> this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community. The Agency for Persons with Disabilities shall adopt rules to specify the standardized intelligence tests as provided in this subsection.

§ 921.137(1), Fla. Stat. (2012). This statute was adopted prior to the Supreme Court's ruling in *Atkins*. *See* Ch.2001-202, § 1, Laws of Fla.

In *Cherry v. State*, 959 So.2d 702 (2007), we determined the proper interpretation of section 921.137. Cherry argued that an IQ measurement is more appropriately expressed as a range of scores rather than a concrete number because of the SEM. We held:

> Both section 921.137 and rule 3.203 provide that significantly subaverage general intellectual functioning means "performance that is two or more standard deviations from the mean score on a standardized intelligence test." One standard deviation on the WAIS-III, the IQ test administered in the instant case, is fifteen points, so two standard deviations away from the mean of 100 is an IQ score of 70.... [T]he statute does not use the word approximate, nor does it reference the SEM. Thus, the language of the statute and the corresponding rule are clear. We defer to the plain meaning of statutes....

Cherry, 959 So.2d at 712-13.

In *Nixon*, the appellant challenged our decision in *Cherry*, also alleging that we improperly imposed a

firm IQ cutoff of 70. We disagreed, reasoning that while *Atkins* recognized a difference of opinion among various sources regarding who should be classified as mentally retarded, the Supreme Court left the determination to the individual states. Accordingly, we found that Florida's definition is consistent with the American Psychiatric Association's di- [709] agnostic criteria for mental retardation. *Nixon v. Florida*, 2 So.3d 137, 143 (Fla.2009) (citing *Jones v. State*, 966 So.2d 319, 326 (Fla.2007)).

The cutoff was recently reaffirmed in *Franqui*. Franqui was convicted of the December 1991 murder of Raul Lopez and sentenced to death, which this Court affirmed. *Franqui v. State*, 59 So.3d 82, 106 (Fla.2011) (citing *Franqui v. State*, 699 So.2d 1312 (Fla.1997)). Franqui filed his initial rule 3.850 motion in January 1999, which he then amended in April 2000. *Id.* at 89. Prior to the evidentiary hearing granted on some of the claims he raised, Franqui supplemented his motion to raise an *Atkins* claim, which was summarily denied on February 21, 2008. *Id.* at 89-90. On review, we temporarily relinquished jurisdiction to the circuit court with directions to hold an evidentiary hearing on the mental retardation claim. *Id.* at 90 (citing *Franqui v. State*, 14 So.3d 238 (Fla.2009)). Testing revealed Franqui's IQ fell somewhere between 71 and 80. *Id.* at 91. The trial court, after considering the stipulated evidence of the experts' reports, found that Franqui was not mentally retarded as a matter of law. *Id.*

On appeal, Franqui raised essentially the same claim Hall raises here, namely: this Court's interpretation of mental retardation mandating a cutoff score of 70 or below to meet the first prong of the test for mental retardation is contrary to *Atkins*. In *Franqui*, we found that (1) the United States Supreme Court did not

mandate a specific IQ score or range for a finding of mental retardation in *Atkins*; (2) Florida's statute prohibiting the execution of the mentally retarded, section 921.137, preceded *Atkins*; (3) proper interpretation of section 921.137 was under the plain language of the statute providing that "significantly subaverage general intellectual functioning" means performance that is "two or more standard deviations from the mean score on a standardized intelligence test" and does not require the Court to consider the standard error of measurement (SEM); and (4) one standard deviation on the test in question is fifteen points, thus 70 is the appropriate score based on the plain language of section 921.137 and not a range of scores.

Hall argues that we recognized a higher IQ as possible evidence of mental retardation in *Thompson v. State*, 3 So.3d 1237 (Fla.2009), where we reversed the trial court's summary denial of Thompson's postconviction motion. Although Thompson's motion alleged an IQ of 74 or 75,[2] we reversed the trial court's summary denial and remanded for the court to hold an evidentiary hearing to determine whether Thompson met the requirements established in *Cherry*. *Thompson*, 3 So.3d at 1238-39. However, we specified, "[W]e express no opinion on the merits of [Thompson's] claim of mental retardation." *Thompson*, 3 So.3d at 1238.

Hall additionally alleges that this Court recognized an IQ score of 75 as "evidence of mental retardation" in *Foster v. State*, 929 So.2d 524 (Fla.2006). Hall mischaracterizes our opinion. We quoted the postconviction court, which found that " 'even if the Defendant's IQ score of 75 is considered as evidence of mental retarda-

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[2] *Thompson*, 3 So.3d at 1239 (Wells, J., dissenting).

tion, [he] does not meet the second prong of the test set forth in *Atkins*...." *Id.* at 532. As such, neither this Court nor the lower court recognized 75 as evidence of mental retardation.

Like Franqui before him, Hall asserts that the statutorily prescribed cutoff is arbitrary because it does not consider the range of scores mentioned in *Atkins*. We [710] have previously found this argument to be meritless. *See, e.g., Cherry*, 959 So.2d at 712-13; *Nixon*, 2 So.3d at 142; *Phillips v. State*, 984 So.2d 503, 510 (Fla.2008); *Jones v. State*, 966 So.2d 319, 329 (Fla.2007); *Brown v. State*, 959 So.2d 146, 148-49 (Fla.2007); *Burns v. State*, 944 So.2d 234, 248 (Fla.2006); *Rodgers v. State*, 948 So.2d 655, 666-68 (Fla.2006); *Trotter v. State*, 932 So.2d 1045, 1049-50 (Fla.2006); *Johnston v. State*, 960 So.2d 757, 761 (Fla.2006); *Zack v. State*, 911 So.2d 1190, 1201 (Fla.2005).

Hall next contends that the lower court improperly limited his introduction of evidence of the second two elements to establish mental retardation. We have recognized that all three elements must be established for a defendant to show that he or she is mentally retarded and thus ineligible for execution.

> The defendant must establish that he has significantly subaverage general intellectual functioning. If significantly subaverage general intellectual functioning is established, the defendant must also establish that this significantly subaverage general intellectual functioning exists with deficits in adaptive behavior. Finally, he must establish that the significantly subaverage general intellectual functioning and deficits in adaptive behavior manifested before the age of eighteen.

Thompson, 3 So.3d at 1238 (quoting *Cherry*, 959 So.2d at 711) (internal brackets omitted). Thus, we have concluded that because a defendant must establish all three elements of such a claim, the failure to establish any one element will end the inquiry. *See, e.g., Cherry*, 959 So.2d at 714 ("Because we find that [the defendant] does not meet this first prong of the section 921.137(1) criteria, we do not consider the other two prongs of the mental retardation determination."). Hall's argument that the lower court improperly limited his introduction of evidence after he failed to establish the requisite IQ is thus without merit. *See Jones v. State*, 966 So.2d 319, 325 (Fla.2007); *Burns v. State*, 944 So.2d 234, 249 (Fla.2006); § 921.137(4), Fla. Stat. (2012).

Third, Hall complains that the trial court abused its discretion in refusing to admit the report prepared by Dr. Mosman through the testimony of Dr. Prichard. In its order, the court noted that Dr. Mosman's report "lacked critical detail and information indicating how he obtained [Hall's] intelligence quotient of sixty-nine (69)." The court determined that the report did not constitute competent evidence and that Hall's failure to comply with the court's order to compel was highly prejudicial to the State and excluded the report from evidence. Because the underlying data to support the report were not available, the State could not conduct a proper voir dire and Hall could not otherwise establish the adequacy of the underlying data to support Dr. Mosman's report. Accordingly, we find that the trial court did not abuse its discretion in excluding the report.

Finally, Hall alleges that the lower court should have been precluded from holding an evidentiary hearing on Hall's alleged mental retardation and should have entered a life sentence because the court previously found him to be mentally retarded. We disagree.

In *Bobby v. Bies*, 556 U.S. 825, 129 S.Ct. 2145, 173 L.Ed.2d 1173 (2009), the United States Supreme Court addressed a similar issue. Michael Bies was tried and convicted in Ohio of the aggravated murder, kidnapping, and attempted rape of a ten-year-old boy nearly one decade prior to the Court's decision in *Atkins*. *Bies*, 129 S.Ct. at 2149. Bies' IQ fell in the 65 to 75 [711] range, indicating that he is "mildly mentally retarded to borderline mentally retarded." *Id.* at 2149-50. On postconviction review, the trial court agreed that Bies was mildly mentally retarded, but concluded that he was still eligible for execution. *Id.* at 2150. After the Supreme Court issued *Atkins*, and the Ohio Supreme Court adopted it in *State v. Lott*, 97 Ohio St.3d 303, 779 N.E.2d 1011 (2002), Bies presented his *Atkins* claim to the state's postconviction court.[3] *Id.* Bies moved for summary judgment, arguing that the record established his mental retardation and that the State was precluded and estopped from disputing it. *Id.* The court denied summary judgment because Bies' mental retardation had not been established under the *Atkins-Lott* framework, and ordered a full hearing. *Id.* at 2151. Bies took his claim to the Federal District Court, arguing that the Fifth Amendment's Double Jeopardy Clause barred the State from relitigating the issue of his mental condition. The court agreed and ordered vacation of Bies' death sentence. The Court of Appeals affirmed. *Id.* The Supreme Court reversed, stating that "[t]he State did not 'twice put Bies in jeopardy.' " *Id.* Further, the court stated that no state-court determination of his mental retardation entitled him to a life sentence. *Id.* at 2152.

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[3] Unlike Florida, Ohio reviews mental retardation where the defendant's IQ is above 70 as a rebuttable presumption.

Here, Hall argues that the issue should be estopped because of the trial court's finding that Hall was mentally retarded as mitigation. As summarized by the Supreme Court in *Bies*,

> even if the core requirements for issue preclusion had been met, an exception to the doctrine's application would be warranted due to this Court's intervening decision in *Atkins*. Mental retardation as a mitigator and mental retardation under *Atkins* ... are discrete legal issues. The *Atkins* decision itself highlights one difference: "[R]eliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." 536 U.S. at 321, 122 S.Ct. 2242. This reality explains why prosecutors, pre-*Atkins*, had little incentive vigorously to contest evidence of retardation.... Because the change in law substantially altered the State's incentive to contest Bies' mental capacity, applying preclusion would not advance the equitable administration of the law.

Bies, 129 S.Ct. at 2153. Accordingly, we deny relief on this claim.

For the foregoing reasons, we affirm the court's denial of Hall's 3.203 motion.

It is so ordered.

POLSTON, C.J., LEWIS, and CANADY, JJ., concur.

PARIENTE, J., concurs with an opinion.

LABARGA, J., dissents with an opinion, in which PERRY, J., concurs.

PERRY, J., dissents with an opinion, in which LABARGA, J., concurs.

QUINCE, J., recused.

PARIENTE, J., concurring.

In 1991, the trial judge who sentenced Freddie Lee Hall to death found Hall to be mentally retarded. Yet, in 2010, the same trial judge found the same defendant not to be mentally retarded. What is the reason for this apparent anomaly? The an- [712] swer lies in the fact that the trial court in 2010 was applying the statutory definition of mental retardation that acts as a bar to execution, which did not exist in 1991. Between 1991 and 2010, two developments in the law occurred: (1) the Legislature enacted section 921.137(1), Florida Statutes (2001); and (2) the United States Supreme Court decided the case of *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

In *Atkins*, the United States Supreme Court dramatically changed the legal landscape pertaining to mental retardation and death penalty jurisprudence. The Supreme Court held that it was unconstitutional under the Eighth Amendment for a mentally retarded person to be executed, but the Court also left to the states "the task of developing appropriate ways to enforce the constitutional restriction" on the execution of such individuals. *Id.* at 317, 122 S.Ct. 2242 (quoting *Ford v. Wainwright*, 477 U.S. 399, 416-17, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986)).

In Florida, our jurisprudence on this issue is constrained by the Legislature's enactment, as long as the Legislature defines mental retardation within the con-

stitutional parameters of *Atkins*. As set forth in *Cherry v. State*, 959 So.2d 702 (2007), the defendant must present evidence of a significant subaverage general intellectual functioning as a threshold for establishing mental retardation. This requirement derives from the language of section 921.137(1), Florida Statutes, which this Court in *Cherry* interpreted as providing a "strict cutoff of an IQ score of 70 in order to establish significantly subaverage intellectual functioning." *Cherry*, 959 So.2d at 712. Based on the legislative definition of mental retardation, the Court rejected the application of the standard error of measurement (SEM) to the IQ score—not because we considered it the better policy but because we were adhering to the plain language of the statute. *Id.* at 712-14.

Applying both the statutory definition and our precedent in this case, the trial court found that there was not competent, substantial evidence to support a finding of an IQ score at or below 70. An outlier test, which was performed by Dr. Mosman, could not be considered because Dr. Mosman's testimony had not been preserved prior to his death.

Nearly twenty years before, in 1991, the trial court resentenced Hall to death and found him to be mentally retarded as a mitigating factor with "unquantifiable" weight. Yet the circumstances in 1991 were different. In 1991, Hall's evidence went unchallenged, whereas in 2010, there was a true adversarial testing of whether Hall was mentally retarded under Florida's statutory definition of mental retardation. In contrast to the 2010 postconviction hearing, during Hall's 1991 resentencing, the State did not contest the evidence Hall presented, but instead relied on its own evidence to establish seven strong aggravators to outweigh the mitigators.

Although the State in 1991 did not contest whether Hall suffered from mental retardation, the trial court noted throughout the sentencing order that it was troubled as to whether the mental health experts presented by the defendant had exaggerated Hall's inabilities. The trial court made certain statements throughout the sentencing order that questioned whether Hall suffered from mental retardation, including an in-depth discussion as to whether his behavior and abilities were consistent with a person who had mental retardation. The court explained in relevant part as follows:

> [Hall's] behavior at the time of the crimes for which he stands convicted, as well as some of the statements that he [713] made previously ... would belie the fact of his severe psychosis and mental retardation. Nothing of which the experts testified could explain how a psychotic, mentally-retarded, brain-damaged, learning-disabled, speech-impaired person could formulate a plan whereby a car was stolen and a convenience store was robbed. Bear in mind that the facts of this case conclusively showed that Freddie Lee Hall was the one that kidnapped Karol Lea Hurst from the Pantry Pride grocery store. Freddie Lee Hall alone was the one that drove Karol Lee Hurst, in broad daylight, through the city of Leesburg to a spot in the woods some eighteen miles distant. There is no evidence as to whether or not Freddie Lee Hall possessed a driver's license, but he was certainly driving a car in broad daylight through city traffic with a kidnapped victim inside.... Nothing in the evidence can explain how Freddie Lee Hall could live a more or less normal life, obtain employment, and substantially remain

> outside of violation of the law during the five (5) years that he was on parole after his first rape conviction. Nothing in the evidence can explain the statements that the defendant made when he testified in his own behalf during his first trial.... In other words, the clinical characterization of the defendant presented by the testimony of the defense experts does not seem to comport with the other evidence of the defendant's background and behavior that are clear from other aspects of the evidence in this case. Thus, this Court believes that the evidence of the experts, for whatever reason or reasons, is exaggerated to some extent.

When discussing mental retardation, the trial judge found as follows: "There is substantial evidence in the record to support this finding. Again, however, there is difficulty in relating this factor back to determine how it affected the defendant's state of mind at the time of the crime. The mitigating factors of this fact are thus 'unquantifiable.' " In evaluating the mitigation in conjunction with the aggravation, the court again noted concerns as to whether the evidence showed that Hall was in fact mentally retarded, stating that "the defendant shows more deliberation and planning than that which might be attributed to a typical retarded defendant."

In 1999, when Hall filed his initial motion for postconviction relief, the trial court again expressed reservations on the issue of mental retardation, stating that Hall "is *probably somewhat* retarded." *Hall v. State* (*Hall VIII*), 742 So.2d 225, 230 (Fla.1999)(emphasis added). At that time, I joined with Justice Anstead in relying on Justice Barkett's position that executing mentally retarded individuals is cruel and unusual punishment, a position that later became the holding of the

United States Supreme Court in *Atkins*. *Hall VIII*, 742 So.2d at 231 (Anstead, J., specially concurring).

When those decisions were rendered in 1991 and 1999, *Atkins* had not yet established the prohibition on executing mentally retarded individuals as cruel and unusual punishment. A trial court could find that a defendant was mentally retarded without regard to any statutory definition of mental retardation and those findings would serve as mitigation in much the same way as mental illness or brain damage. Therefore, because mental retardation was not a bar to execution, the State would not have had the same interest in controverting the expert testimony if, as occurred here, there was such overwhelming evidence in aggravation. Thus, as it applies to this case, until this current postconviction proceeding, there was no true [714] adversarial testing on the issue of whether Hall's mental deficits qualified as mental retardation under a statutory definition that was enacted only after Hall's direct appeal and prior postconviction proceedings.

I appreciate the views expressed in the dissents written by Justice Labarga and Justice Perry. I echo the sentiment that Justice Labarga highlights in his dissent: "[T]he imposition of an inflexible bright-line cutoff score of 70, even if recognized as often describing the upper range of mild mental retardation, is not in every case an appropriate way to enforce the restriction on execution of the mentally retarded." Dissenting op. at 27 (Labarga, J.). Unquestionably, clinical definitions of mental retardation recognize the need for application of the SEM and the use of clinical judgment. In fact, the American Psychiatric Association (APA) proposes a revision to the definition of mental retardation that will replace the use of a numerical score for mental retardation and instead refer to an Intellectual

Development Disorder (IDD). However, unless this Court were to recede from *Cherry*, 959 So.2d at 712-13, as reaffirmed in *Nixon v. State*, 2 So.3d 137, 142-43 (Fla.2009), and more recently in *Franqui v. State*, 59 So.3d 82, 92-94 (Fla.2011), a plain language interpretation of Florida's bright-line cutoff score of 70 will remain the rule of law in this state.

Florida, while not unique in its use of a bright-line cutoff score of 70, is not in the majority, although there is no clear national consensus. Among the states around the nation that continue to have the death penalty, ten states have a statutory bright-line rule that do not apply the SEM, including Florida.[4] On the other hand, sixteen states do apply the SEM, including ten states without a statutory bright-line cutoff.[5] At least

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[4] These states are the following: Arkansas (Ark.Code Ann. § 5-4-618(a)(2) (2012)); Delaware (Del.Code Ann. tit. 11, § 4209(d)(3) (2012)); Florida (§ 921.137(1), Fla. Stat. (2012)); Idaho (Idaho Code Ann. § 19-2515A(1)(b) (2012)); Kentucky (Ky.Rev.Stat.Ann. § 532.130(2) (2012)); Maryland (Md.Code Ann., Crim. Law § 2-202(b)(1)(i) (2012)); North Carolina (N.C.Gen.Stat.Ann. § 15A-2005(a)(1) (2012)); Tennessee (Tenn.Code Ann. § 39-1-203(a)(1) (2012)); Virginia (Va.Code Ann. § 19.2-264.3:1.1(A) (2012)); and Washington (Wash. Rev.Code Ann. § 10.95.030(2)(c) (2012)).

[5] The states that apply the SEM without a statutory bright-line rule are as follows: California, *see In re Hawthorne*, 35 Cal.4th 40, 24 Cal.Rptr.3d 189, 105 P.3d 552, 557-58 (2005); Georgia, *see Stripling v. State*, 261 Ga. 1, 401 S.E.2d 500, 504 (1991); Indiana, *see Woods v. State*, 863 N.E.2d 301, 303-04 (Ind.2007); Mississippi, *see Chase v. State*, 873 So.2d 1013, 1028 n. 18 (Miss.2004); Missouri, *see State v. Johnson*, 244 S.W.3d 144, 153 (Mo.2008) (en banc); Nevada, *see Ybarra v. State*, 247 P.3d 269, 274-76 (Nev.2011), *cert. denied*, — U.S. —, 132 S.Ct. 1904, 182 L.Ed.2d 776 (2012); Ohio, *see State v. Were*, 118 Ohio St.3d 448, 890 N.E.2d 263, 293 (2008); Pennsylvania, *see Comm. v. Miller*, 585 Pa. 144, 153-54, 888 A.2d 624 (Pa.2005); Texas, *see Ex parte Hearn*, 310 S.W.3d 424, 430 (Tex.Crim.App.2010); and Utah, *see State v. Maestas*, No.

an additional two states through court decision do not apply the SEM.[6] The application of the SEM to IQ [715] scores in the remaining four states is unclear.[7]

This national survey of the states that have the death penalty illustrates that there is no clear consensus among the states regarding the use of the SEM, but the use of a bright-line cut off in some states versus the use of the SEM in other states indicates that there will be some inconsistency in findings of mental retardation based on the exact same circumstances.

It is certainly of concern that in some states Hall would be mentally retarded by those states' definitions, while in others, like Florida, the bright-line cutoff requires a contrary finding. Unfortunately, mental retardation, unlike age, is not a fixed objective test, and therefore these variations appear to have been contemplated by the United States Supreme Court when *Atkins* was decided. For example, the State of Texas, which leads the nation in executions, declined to estab-

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20080508, 299 P.3d 892, 947, 2012 WL 3176383, at *41 (Utah July 27, 2012).

The states that apply the SEM but include a statutory bright-line cut-off are as follows: Arizona, *see State v. Grell*, 212 Ariz. 516, 135 P.3d 696, 701 (2006); Louisiana, *see State v. Dunn*, 41 So.3d 454, 470 (La.2010); Nebraska, *see State v. Vela*, 279 Neb. 94, 777 N.W.2d 266, 304-05 (2010); Oklahoma, *see Smith v. State*, 245 P.3d 1233, 1237 (Okla.Crim.App.2010); Oregon, *see* Or.Rev.Stat. Ann. § 427.005(10)(b) (2012); and Tennessee, *see Coleman v. State*, 341 S.W.3d 221, 245-47 (Tenn.2011).

[6] These states are: Alabama, *see Ex parte Perkins*, 851 So.2d 453, 455-56 (Ala.2002); and Kansas, *see State v. Backus*, 287 P.3d 894, 905 (Kan.2012).

[7] These states are New Hampshire, South Carolina, South Dakota, and Wyoming.

lish a bright-line IQ cut off for execution without "significantly greater assistance from the legislature." *Ex parte Hearn*, 310 S.W.3d 424, 430 (Tex.Crim.App.2010). The *Hearn* Court stated that any IQ score could actually represent an IQ that is either five points higher or five points lower than the person's actual IQ after factoring in the SEM. *Id.* at 428.

At some point in the future, the United States Supreme Court may determine that a bright-line cutoff is unconstitutional because of the risk of executing an individual who is in fact mentally retarded. However, until that time, this Court is not at liberty to deviate from the plain language of section 921.137(i). *See Hayes v. State*, 750 So.2d 1, 4 (Fla.1999) ("We are not at liberty to add words to statutes that were not placed there by the Legislature."). Without a change from the Legislature or further direction from the United States Supreme Court, I conclude that the statute adopted by the Legislature and the precedent set forth by this Court require that the trial court's order finding Hall not to be mentally retarded be affirmed.

LABARGA, J., dissenting.

I dissent from the holding of the majority that application of the statutory bright-line cutoff score of a full scale IQ of 70 for determining mental retardation as a bar to execution comports with the Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304, 317, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), under the facts and circumstances of this case. I write to express my deep concern with the fact that even though Hall was found to be retarded long before the Supreme Court decided *Atkins*, and even though evidence was presented below that he remains retarded, we are unable to give effect to the mandate of *Atkins* under the definition of "mental retar-

dation" set forth in section 921.137(1), Florida Statutes (2012). In 1993, on appeal from Hall's resentencing, Justice Barkett, joined by Justice Kogan, pointed out in her dissent that the trial judge in this case found that Hall "has been mentally retarded all of his life." *Hall VII*, 614 So.2d at 479 (Barkett, C.J., dissenting). At that time, mental retardation was not an absolute bar to execution, but was considered generally in mitigation. Subsequently, on postconviction appeal in 1999, Hall's claim that execution of mentally retarded persons violated the United States Constitution was found to be procedurally barred. *See Hall VIII*, 742 So.2d at 226. In his special concurrence in *Hall VIII*, Justice Anstead, joined by Justice Pariente, expressed the view that execution of mentally retarded persons such as Hall violated the Florida Constitution. *Id.* at [716] 230-31 (Anstead, J., specially concurring). In 2001, Hall again attempted to obtain relief on his claim that he may not constitutionally be executed because he is mentally retarded. This Court denied relief, noting that the trial court had followed *Penry v. Lynaugh*, 492 U.S. 302, 340, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), in which the Supreme Court had held there is no constitutional bar to prevent execution of the mentally retarded. *See Hall v. Moore*, 792 So.2d 447, 449 (Fla.2001). One year later, the United States Supreme Court overruled *Penry* in *Atkins* and held that execution of the mentally retarded violates the constitutional prohibition against cruel and unusual punishment. *Atkins*, 536 U.S. at 321, 122 S.Ct. 2242. Thus, ever since the trial court found him to be retarded, Hall has urged this Court to hold that, because he is mentally retarded, he may not be executed. But for the vagary of the timing of the trial court's conclusion in relation to the timing of the Supreme Court's decision in *Atkins*, Hall would not be on death row today.

The situation present in Florida, in which the Legislature has established a bright-line cutoff score that this Court has upheld, now creates a significant risk that a defendant who has once been found to be mentally retarded may still be executed. I believe this result is not in accord with the rationale underlying the constitutional bar to execution of the mentally retarded, which the United States Supreme Court set forth in *Atkins*. A state's procedural safeguards must protect against an erroneous conclusion that the offender is *not* mentally retarded. In order to meet constitutional muster, I believe that Florida's statutory and rule provisions, which were put into place with the laudable goal of assuring that mentally retarded individuals are not executed, must be crafted—or at a minimum construed—so as to avoid the unwarranted risk of an erroneous mental retardation determination that would allow those who are mentally retarded to be executed.

In its 2005 holding that the Constitution prohibits execution of defendants who were under the age of eighteen at the time of the murder, the Supreme Court in *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), explained:

> The *Atkins* Court neither repeated nor relied upon the statement in *Stanford*[8] that the Court's independent judgment has no bearing on the acceptability of a particular punishment under the Eighth Amendment. Instead we returned to the rule, established in decisions predating *Stanford*, that " '*the Constitution contemplates that in the end our own judgment*

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[8] *Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989).

> *will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.*' " 536 U.S., at 312 [122 S.Ct. 2242] (quoting *Coker v. Georgia*, 433 U.S. 584, 597, 97 S.Ct. 2861 [53 L.Ed.2d 982] (1977) (plurality opinion)). Mental retardation, the Court said, diminishes personal culpability even if the offender can distinguish right from wrong. 536 U.S., at 318 [122 S.Ct. 2242]. The impairments of mentally retarded offenders make it less defensible to impose the death penalty as retribution for past crimes and less likely that the death penalty will have a real deterrent effect. *Id.*, at 319-320 [122 S.Ct. 2242]. Based on these considerations and on the finding of national consensus against executing the mentally retarded, the Court ruled that the death penalty constitutes an excessive sanction for the entire category of mentally retarded offenders, and that the Eighth Amendment " 'places a [717] substantive restriction on the State's power to take the life' of a mentally retarded offender." *Id.*, at 321 [122 S.Ct. 2242] (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 [106 S.Ct. 2595, 91 L.Ed.2d 335] (1986)).

Roper, 543 U.S. at 563-64, 125 S.Ct. 1183 (emphasis added). Similarly, I urge this Court to bring its own judgment to bear on the question of the constitutional acceptability of the execution of persons who, under all the facts and data reasonably relied upon by mental health experts, have been determined to be mentally retarded when the execution is permitted solely by the Legislature's inflexible definition of mental retardation. The Court in *Roper* reminds us that the prohibition against cruel and unusual punishment in the Eighth

Amendment must be interpreted in part "with due regard for its purpose and function in the constitutional design." *Id.* at 560, 125 S.Ct. 1183. "To implement this framework we have established the propriety and affirmed the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual." *Id.* at 560-61, 125 S.Ct. 1183. The Supreme Court noted that when it decided *Atkins*, "[w]e held that standards of decency have evolved since *Penry* and now demonstrate that execution of the mentally retarded is cruel and unusual punishment." *Roper*, 543 U.S. at 563, 125 S.Ct. 1183. The difficulty has been in finding a reliable way in which to determine which capital defendants fall into this class of persons for whom execution is barred.

The *Atkins* Court noted that the accepted definitions for mental retardation refer in pertinent part to "significantly subaverage intellectual functioning." *Atkins*, 536 U.S. at 308 n. 3, 122 S.Ct. 2242. That Court did not prescribe any specific IQ score as a bright-line cutoff, although the Court noted that "mild" mental retardation is typically used to describe people with an IQ level range of 50 to 70. *Id.* However, this typical description was not given as a mandated cutoff score, and the Court later noted that "[t]o the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded." *Id.* at 317, 122 S.Ct. 2242. This prediction certainly proved prescient in Florida, as Florida courts have continued to struggle with evaluation of the claims of mental retardation raised by capital defendants. I recognize that it is because of this very difficulty in determining which offenders are in fact mentally retarded that the Supreme Court left "to

the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Id.* (quoting *Ford v. Wainwright*, 477 U.S. 399, 416-17, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986)). We must focus, however, on the Supreme Court's mandate that the ways developed by the States must actually be "appropriate" to enforce the restriction. In my view, the imposition of an inflexible bright-line cutoff score of 70, even if recognized as often describing the upper range of mild mental retardation, is not in every case an appropriate way to enforce the restriction on execution of the mentally retarded. This is true where, as here, ample evidence has been presented that the defendant has been mentally retarded from an early age despite the achievement of an IQ score over 70 on IQ testing. The Supreme Court barred execution of mentally retarded individuals based in part on the evolving standards of decency in our maturing society, and those standards should include thoughtful consideration of all the factors that mental health professionals consider in determining whether an individual is mentally retarded, without ap- [718] plication of an inflexible, oftentimes arbitrary, bright-line cutoff IQ score.

In 2010, the United States Supreme Court decided *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), in which it held that sentencing juvenile offenders to life in prison without the possibility of parole for non-homicide offenses violates the Cruel and Unusual Punishment clause of the United States Constitution. *Id.* at 2034. In explaining its decision, the Court noted that in *Atkins* it barred execution of offenders "whose intellectual functioning is in a low range." *Id.* at 2022. Hall certainly meets that standard and has met that standard for his entire life.

The United States Supreme Court has not been unwilling to recede from or overrule its precedent when it concludes that execution of certain classes of persons violates the Eighth Amendment. Nor should this Court be unwilling to do the same. Where, as here, the evidence has long established that a defendant is functionally mentally retarded, I believe there is a justifiable concern of constitutional magnitude in putting such a defendant to death. That same concern should lead this Court to revisit its precedent that has heretofore bound this Court to the inflexible test set forth by the Legislature for identification of mentally retarded persons who are not constitutionally subject to execution. For all the foregoing reasons, I also encourage the Legislature to reexamine its definition of mental retardation set forth in section 921.137(4), in light of the principles set forth in the United States Supreme Court's decision in *Atkins*.

PERRY, J., concurs.

PERRY, J., dissenting.

If the bar against executing the mentally retarded is to mean anything, Freddie Lee Hall cannot be executed. Hall "has been retarded his whole life." I do not disagree with my esteemed colleagues that section 921.137(1), Florida Statutes (2012), and our caselaw provide that a defendant must establish an IQ below 70 to be ineligible to be executed, but that statute as applied here reaches an absurd result. Because this is my belief, I respectfully dissent.

The record before us is replete with indications of Hall's mental retardation. This Court has twice noted the evidence demonstrating Hall's mental retardation:

The testimony reflects that Hall has an IQ of 60; he suffers from organic brain damage, chronic psychosis, a speech impediment, and a learning disability; he is functionally illiterate; and he has a short-term memory equivalent to that of a first grader. The defense's four expert witnesses who testified regarding Hall's mental condition stated that his handicaps would have affected him at the time of the crime. As the trial judge noted in the resentencing order, Freddie Lee Hall was "raised under the most horrible family circumstances imaginable."

Indeed, the trial judge found that Hall had established substantial mitigation. The judge wrote that the evidence conclusively demonstrated that Hall "may have been suffering from mental and emotional disturbances and may have been, to some extent, unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." Additionally, the judge found that Hall suffers from organic brain damage, has been mentally retarded all of his life, suffers from mental illness, suffered tremendous emotional deprivation and disturbances throughout his life, suffered tremendous physical abuse and torture as a child, and has learning disabilities and a distinct speech impedi- [719] ment that adversely affected his development.

Hall's mental deficiency as an adult is not surprising. The sixteenth of seventeen children, Hall was tortured by his mother and abused by neighbors. Various relatives testified that Hall's mother tied him in a "croaker" sack, swung it over a fire, and beat him; buried

> him in the sand up to his neck to "strengthen his legs"; tied his hands to a rope that was attached to a ceiling beam and beat him while he was naked; locked him in a smokehouse for long intervals; and held a gun on Hall and his siblings while she poked them with sticks. Hall's mother withheld food from her children because she believed a famine was imminent, and she allowed neighbors to punish Hall by forcing him to stay underneath a bed for an entire day.
>
> Hall's school records reflect his mental deficiencies. His teachers in the fourth, sixth, seventh, and eighth grades described him as mentally retarded. His fifth grade teacher stated that he was mentally maladjusted, and still another teacher wrote that "his mental maturity is far below his chronological age."

Hall VIII, 742 So.2d at 231 (Anstead, J. specially concurring) (quoting *Hall VII*, 614 So.2d at 479-80 (Barkett, C.J. dissenting)). Hall is a poster child for mental retardation claims because the record here clearly demonstrates that Hall is mentally retarded. The fact that our statutory standard does not agree only serves to illustrate a flaw in the statute.

As the United States Supreme Court articulated in Atkins, those with disabilities in areas of reasoning, judgment, and control of their impulses "do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." *Atkins*, 536 U.S. at 306, 122 S.Ct. 2242. Indeed, "our society views mentally retarded offenders as categorically less culpable than the average criminal." *Id.* at 316, 122 S.Ct. 2242. Thus, while there is agreement about the execution of mentally retarded offenders, there remains disagree-

ment, and difficulty, in determining which offenders are retarded. "Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." *Id.* at 317, 122 S.Ct. 2242. *Atkins* thus left this determination to the states.

Prior to *Atkins*, this State adopted section 921.137, which provides in relevant part:

> The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities.

§ 921.137(1), Fla. Stat. (2012)

As we observed in *Cherry*, mental health practitioners are expected to look at IQ as a range rather than an absolute.

> The concept of mental retardation is considered to be a range or band of scores, not just one score or a specific cutoff for mental retardation. The idea behind that is there's recognition that no one IQ score is exact or succinct, that there's always some variability and some error built in.
>
> And the Diagnostic and Statistical manual which is what we—meaning the mental health professionals—rely on when arriving at diagnostic hypotheses. That manual guides us to look at IQ scores as being a range rather than absolute. And the manual talks about a score from 65, a band, so to speak, from [720] 65 to

> 75—and of course, lower than 65—comprising mental retardation.

Cherry, 959 So.2d at 711-12 (quoting Dr. Peter Bursten). Nevertheless, this Court was constrained by the language of the statute and found that an IQ higher than 70 failed to meet the first prong of section 921.137(1), and that no further inquiry was necessary. *Id.* at 714.

Thus far, our interpretation of the statute and applicable rule has led us to a dogged adherence to a bright-line cutoff of a score of 70 on the IQ test.[9] Yet, even when a defendant is able to demonstrate a lower IQ, the rest of the statute allows the courts to reason that the defendant is not mentally retarded. *See, e.g.*, *Dufour v. State*, 69 So.3d 235, 244-53 (Fla.2011) (finding that despite IQ scores of 62, 67, and 74, Dufour failed to establish deficits in adaptive functioning because he was able to complete his GED and live independently); *Hodges v. State*, 55 So.3d 515, 527, 535 (Fla.2010)(finding that although Hodges had IQ scores of 62, 66, and 69, he did not establish deficits in adaptive functioning because he was able to copy letters drafted by others and sign his own name and was able to support himself as a short-order cook, garbage collector, and dishwasher); *Rodgers v. State*, 948 So.2d 655, 661 (Fla.2006) (finding that the trial court did not err in

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[9] This is so even despite subsection four of section 921.137, which provides, in part:

> At the final sentencing hearing, the court shall consider the findings of the court-appointed experts and consider the findings of any other expert which is offered by the state or the defense on the issue of whether the defendant has mental retardation.

§ 921.137(4), Fla. Stat. (2012); *see also* Fla. R. Admin. P. 65G-4.011(2) (2012).

finding that the defense expert's recitation of Rodgers' IQ of 69 was less credible evidence than court-appointed experts who found higher IQs); *Burns v. State*, 944 So.2d 234, 248 (Fla.2006) (finding that despite an IQ of 69, Burns was unable to establish deficits in adaptive functioning because he was able to support himself); *Rodriguez v. State*, 919 So.2d 1252, 1266 (Fla.2005) (finding that despite his low IQ, his behavior in trial proceedings indicated that he was not mentally retarded). We have interpreted the statute as requiring a threshold for the courts to even consider retardation, but then allow the same courts to subjectively reason away the bar to execution. Thus, under this interpretation of the statutory scheme, a defendant can be found mentally retarded but not have it serve as a bar to execution because his IQ is too high, and if his IQ is low enough, he can still be found not to be mentally retarded because he can hold a pen to paper. Thus, it appears there is no reasonable way to be declared mentally retarded for the purposes of proving ineligibility for execution in Florida. If the proscription against executing the mentally retarded is to mean anything, it cannot be wielded as this double-edged sword.

The current interpretation of the statutory scheme will lead to the execution of a retarded man in this case. Hall had been found by the courts to be mentally retarded before the statute was adopted. Once the statute is applied, Hall morphs from someone who has been "mentally retarded his entire life" to someone who is statutorily barred from attempting to demonstrate concurrent deficits in adaptive functioning to establish retardation. Because this cannot be in the interest of justice, I dissent.

LABARGA, J., concurs.

SUPREME COURT OF FLORIDA

No. SC10-1335
Lower Tribunal No(s).: 1978-CF-0052

FREDDIE LEE HALL,

Appellant(s),

v.

STATE OF FLORIDA,

Appellee(s).

[seal/stamp omitted]

Appellant's Motion for Rehearing is hereby denied.

POLSTON, C.J., and PARIENTE, LEWIS, CANADY, LABARGA, and PERRY, JJ., concur.

QUINCE, J., recused.

A True Copy

Test:

/s/ Thomas D. Hall
Thomas D. Hall
Clerk, Supreme Court

th

Served:

HON. ANTHONY MICHAEL TATTI
ERIC CALVIN PINKARD
RAHEELA AHMED
CAROL CONTRERAS RODRIGUEZ
KENNETH SLOAN NUNNELLEY
HON. GLORIA I. HAYWARD, CLERK
HON. RICHARD TOMBRINK, JR., JUDGE

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR HERNANDO COUNTY

SUMTER COUNTY
CASE No. 1978-CF-00052-A

STATE OF FLORIDA,

Plaintiff,

v.

FREDDIE LEE HALL,

Defendant.

Dec. 7 & 8, 2009

EVIDENTIARY HEARING

* * *

[5]

Thereupon, the following proceedings were had and taken in regard to the above-styled case out of the presence of the defendant:)

THE COURT: Good morning. This is the case of State of Florida versus Freddie Lee Hall, 1978-CF-00052-A. Our court reporter today is Patti Marshall with Joy Hayes' office. I would like the pertinent parties—I'm sure the court reporter knows everybody, but if you could introduce yourselves, starting with the state's table, and who you are affiliated with—

MR. TATTI: My name is Anthony Tatti. I'm representing the State of Florida on behalf of the State Attorney's Office for the Fifth Judicial Circuit of Florida.

MR. NUNNELLEY: Ken Nunnelley, Senior Assistant Attorney General, also on the behalf of the State of Florida.

MS. RODRIGUEZ: Carol Rodriguez from CCRC, representing Mr. Freddie Lee Hall.

MS. AHMED: Good morning, Judge. Raheela Ahmed, also representing Mr. Freddie Lee Hall.

THE COURT: Your first name is?

MS. AHMED: Raheela, R-A-H-E-E-L-A.

THE COURT: Last name?

[6]

MS. AHMED: A-H-M-E-D.

THE COURT: Very good. Now, Mr. Freddie Lee Hall is not present. My understanding is that CCRC has waived his presence?

MS. RODRIGUEZ: (Nodding head.)

THE COURT: You have filed an affidavit indicating a waiver and request that he not be present.

MS. RODRIGUEZ: (Nodding head.)

THE COURT: Do you have anything more you want to say about that?

MS. RODRIGUEZ: No, your Honor, I will represent on the record that that is correct. Mr. Hall contacted our offices through family members indicating that he did not wish to attend this hearing. We took that information via telephone; we then made a visit to Mr. Hall in person to ascertain that that was still his wish, not to attend. At that time, we took a waiver and had him execute the affidavit that was filed with the Court in this case.

And Mr. Hall was made aware that this Court had granted our request to move these proceedings, because, initially, he had expressed a concern about coming to this particular courthouse. So he [7] was aware of that, your Honor. And yet still opted to engage in the waiver. So that's the extent of it, and I would represent on the record that he was fully informed when he chose to waive his appearance before court today.

THE COURT: Anybody want to be heard regarding that?

MR. TATTI: Your Honor—

THE COURT: I'm not requiring that anybody be heard. But if anybody wants to be heard, now is the time to speak.

MR. TATTI: Judge, if the Court will note, we did file a very brief response registering our objection to the waiver. And very simply, your Honor, this is a pleading which alleges that the defendant is mentally retarded. And the Court has had absolutely no opportunity to observe or inquire of Mr. Hall to assess the validity of his waiver of a fundamental right to be present at this proceeding.

(Whereupon, Ms. Ahmed left the courtroom.)

MR. TATTI: Our objection was, frankly, because both Mr. Nunnelley and myself were uncomfortable about how a court up the line would view a waiver in this setting. And I'm still, [8] frankly, uncomfortable with it. I will defer to the Court's ruling on the matter, but it is, at a minimum, unsettling that we would be in a posture to accept a written affidavit waiving his appearance, waiving a fundamental right on a defendant whose lawyers claim is mentally retarded, under any definition of that term. So the state objects.

THE COURT: Any response from the defense?

MS. RODRIGUEZ: Your Honor, other than to represent to the Court that we have had other clients in similar situations in evidentiary hearings that have executed these waivers in a number of jurisdictions, and have fully informed Mr. Hall of his rights. We have had occasion where the Court has conducted a hearing and actually spoken to the defendant, in addition to the waiver, only in one particular case. And in the other cases, the waiver has been sufficient in order to waive that defendant's appearance. This particular Court has had an opportunity to observe—

(Whereupon, Ms. Ahmed returned to the courtroom.)

MS. RODRIGUEZ: —in the history of this case the defendant. So it's not a case where this Court [9] has not seen Mr. Hall. And so, I would just represent that—represent that to the Court.

THE COURT: As an officer of the court—you stated this in your affidavit, but I'm just trying to make sure it's clear on the record.

MS. RODRIGUEZ: Yes, sir, your Honor.

THE COURT: As an officer of the court, you believe that he signed that knowingly and intelligently and freely and voluntarily, wishing to not be present today, understanding what he was doing and with the understanding that he has a, as counsel has said, a fundamental Constitutional right to be here, present today?

MS. RODRIGUEZ: Yes, your Honor. I do believe that Mr. Hall did that after speaking with—family members made the request initially. We placed a telephone call to him. He was given a few days between the date that I spoke with him by phone and the day

that I went to visit him so that I would be sure that he had fully considered the issue. And we both, Raheela Ahmed and myself, visited with him and explained to him what he was doing in terms of not coming to the hearing.

Having been fully informed in that manner, he decided to go forward and still waive his [10] appearance. So it is my representation to the Court that it was done knowingly and voluntarily, your Honor.

MR. TATTI: And intelligently. That's the other magic word.

MS. RODRIGUEZ: Yes.

THE COURT: That's the catch phrase. I understand the state's position, and I understand the penumbras, if you will, the inferences and innuendos in what you are suggesting. It's not lost on the Court. But that is what the defense has requested.

Under the authority of Florida Supreme Court case *Brown v. State*, which is 894 So.2d 137 also at 29 FLW S. 764, the Court will approve the waiver. Apparently, it's authorized and can be done. And I certainly wasn't expecting it, but it has occurred and the Court will accept it for what it is and will note that Mr. Hall has waived his appearance here today.

MS. RODRIGUEZ: Your Honor, we have a couple of—one housekeeping matter. That is a proposed order to transcribe the evidentiary hearing and at the conclusion of the evidentiary hearing—

THE COURT: This hearing?

[11]

MS. RODRIGUEZ: Yes, your Honor. We would request the Court to grant the ability to submit written

closing arguments, because of the volume of the records, and we would be able to file those written closings at the conclusion of this proceedings. I had shared with opposing counsel a proposed order with a timetable that we have used in other cases, but I have not had a response with regard to that issue and wished to address the Court in terms of filing written closings in this case.

THE COURT: Normally, I discuss that at the end of the case when we get to that point. I'm not fundamentally opposed to that, but let's see how this case plays out and how our time works out, and then we'll look at it. That would be what I would propose. Is that a problem to either side?

MR. TATTI: No, sir.

MS. RODRIGUEZ: No, your Honor.

MR. TATTI: Just so the record is clear, I arrived at my office in Ocala this morning at approximately 6:30 for the purpose of securing a vehicle to transport me to Hernando County and found counsel's pleading on my desk.

THE COURT: Which pleading are we referencing?

[12]

MR. TATTI: The request for written closing argument. So that's when I first saw it.

MS. RODRIGUEZ: I believe we filed it on December 1st.

THE COURT: I have not seen such a document, myself. But I think that's something we'll deal with at the appropriate time unless it's absolutely necessary that we deal with it now.

MS. RODRIGUEZ: Oh, no, your Honor.

THE COURT: Now, are there any other matters, preliminary, that either side wants to raise before we move on?

MR. TATTI: Your Honor, I filed, last week, and should have provided to the Court, a courtesy copy—

THE COURT: Yes (indicating).

MR. TATTI: —a motion in limine. And I would ask that we address that issue now as, I believe, that that—depending on how the Court rules, may shape the flow of evidence during the next day or so that we'll be here. I basically stand by my motion.

The motion requests that the Court limit presentation of evidence in three regards: First of all, the state is—it is the state's position [18] that because Florida Statute 931.137 sets out a three-part test or definition of mental retardation, which the Florida Supreme Court has now clearly addressed—

THE COURT: Mr. Tatti, let me stop you at that point. I apologize for interrupting, but just appearing on my bench, just moments ago, as I walked in the door, is a limited—what's titled a limited response to state's motion in limine. I have not seen this until just now.

MS. FAGAN: That was just handed to us.

THE COURT: And I would like to read it.

MR. TATTI: Yes, sir.

THE COURT: And I would like to take a break, recess to read it. I don't know what it says and—

MR. TATTI: Yes, sir.

THE COURT: —obviously, these are important issues. And since there has been a response, I need to look at it.

MR. TATTI: I got it about the same time you did.

THE COURT: I wish I'd have known about it in the hour and a half we were waiting to get started today, but I didn't see it until just now.

[14]

MR. TATTI: Yes, sir.

THE COURT: So I'm going to take five, ten minutes, that should be all it will take. I'm going to go off the bench, read this, see if I need to do any research on it, and I will be right back. Court will be in recess for five minutes.

(A recess was taken.)

THE COURT: Please have a seat. Let the record reflect that I have gone off the bench to carefully review the limited response to state's motion in limine, provided as I previously walked onto the bench by the defense. I have now read it, and I'm ready to go back to where we were before I interrupted Mr. Tatti. And, Mr. Tatti, you may proceed with what you were saying about your motion in limine.

MR. TATTI: Yes, sir. The motion seeks the Court's order limiting the presentation of evidence in this hearing in three regards: First of all, under the law as it exists today, that is, after the passage of 921.137 and the Supreme Court's subsequent opportunity to address that statute, interpret it and set the ground rules for this proceeding, which I can remind the Court, when this original motion was filed, we neither had a rule or [15] any clear direction as to exactly

how this proceeding was supposed to function, when the motion was filed back in 2005.

Since that time, a rule of criminal procedure has been adopted as well as several very enlightening opinions from the Florida Supreme Court on 921.137. My motion simply addresses the law as it exists today. And the first part of the motion requests that the Court limit the defendant to first establish that he has, within the meaning of the statute, significantly subaverage general intellectual functioning. That is the first of the three prongs of the definition of mental retardation in the statute. The three prongs that are conjoined by the word "and."

The Supreme Court has made it perfectly clear that all three parts of that definition must be present before a defendant can be found mentally retarded within the meaning of 921.137 and thus ineligible for the death penalty. The issue in this statute is Mr. Hall's mental status to be executed, not his mental status for the purpose of mitigation or anything retrospectively. It's his condition today.

I would submit that the Supreme Court has made [16] it clear that it is not only appropriate, but it—their own opinion in *Cherry*, they shut down their analysis of Cherry's mental retardation at his I.Q. The last paragraph of the *Cherry* opinion clearly says because his I.Q.—I will read it. "Because we find that Cherry does not meet this first prong of Section 921.137, Subsection 1 criteria, we do not consider the other two prongs of mental retardation. Determination: We affirm the circuit court's denial of Cherry's motion for a determination of mental retardation.

So, the state submits that as the Court has the complete authority to control the presentation of evi-

dence in this proceeding, that the Court enter an order directing the defendant, as the defendant has the burden of proof by clear and convincing evidence in this proceeding, that they first establish that Mr. Hall's I.Q. is 70 or below. Absent that demonstration, the remaining elements of the exemption are irrelevant until he can establish that his I.Q. is 70 or below. There is no need to address adaptive functioning. And there is no need to determine whether or not Mr. Hall's condition existed at the time he was 18 years of age.

[17]

I would agree that the adaptive functioning is relevant to the second and the third prongs of the definition. However, part B of my motion in limine would limit the defendant to establishing that his deficits in adaptive functioning exist concurrently with his intelligence issues, which would mean now, not when he was 5 years of age or in elementary school. And frankly, not when he was between the ages of 25 and 30, prior to his incarceration.

Mr. Hall has been a resident of the Department of Corrections since February of 1978. His relevant community is the Department of Corrections. And absolutely no part of Dr. Prichard's report addresses his level of adaptive functionings in his environment, which is what the second prong addresses. And the cases that I've cited in the motion in limine are Florida Supreme Court opinions on that regard: *Phillips v. State*, at 984 So.2d 503. That's the law. It's only if those first two elements can be established, is there any reason to look at what Mr. Hall's adaptive functioning would have been at the time he was 18 years of age, because that third prong requires that all of this, one and two, have onset at or before age 18. And what I am seeking [18]

is simply that the Court control the presentation of evidence, as is the Court's right, consistent with clearly established Florida law on this subject.

Now, I couldn't tell you that I could have made this motion prior to *Cherry* and the cases that have followed *Cherry*. But *Cherry* and every case from the Supreme Court that has followed it make it clear that that's the procedure. And there is no gray area here. It's a three-part test, each part of which must be established. It is perfectly reasonable for the Court to direct the defendant to establish—present evidence on the first prong, and if they can't, there is no relevance to the remaining parts of the test.

Now, if counsel—depending on how the Court rules, should the Court grant my motion, I do not have an objection to counselor proffering what it is she wants to put in the record in some expeditious manner. But it is my position that there is no relevance to testimony concerning Mr. Hall's adaptive functioning from 30 years ago, until we have established prong 1 and prong 2 of the definition. And my position is they can't establish it. I don't think the defendant can [19] establish that his I.Q. is 70 or below, particularly given the fact that the report that was attached to the pleading which initiated this proceeding says that his I.Q. is 71.

THE COURT: Response?

MS. RODRIGUEZ: Yes, if we may be heard, your Honor. And I apologize for the inarticulate nature of the response. We stayed very late last night just to be able to file the limited response that we filed with the Court.

And to begin with, there are some real differences, obviously, of opinion here in terms of what the Court

should or should not do on this request by the state. And I will start by saying to the Court that if it had been intended for the Court to only test I.Q. and test I.Q. first, adaptive functioning second and then move to the third prong, it would be so stated right off the bat in the rule, and it is not.

One of the things in the rule is the word mentioned "and." That means all of them co-exist together in order to make that determination. And so I would suggest to the Court, first of all, that while the Supreme Court is correct—it did look at *Cherry*, and they looked at one score in [20] *Cherry*—this is a different situation entirely that's before the Court with regards to Mr. Hall. And I say that to you because Mr. Hall has other test scores that are below 70.

Mr. Hall and the evidence shows a 60 in his prior record. And substantial evidence in that record for this Court to have found mitigation and have termed him as "mentally retarded." Mr. Cherry did not have a diagnosis of mentally retarded going into his hearing. That's a real difference between Mr. Hall and a real difference between Mr. Cherry.

The Court's question at this juncture is whether or not Mr. Hall's evaluation in 1990 and the finding by this Court of mental retardation is the equivalent of what the law provides today. That's what the Court is looking at. I would suggest to the Court that we are following the rule and, obviously, the diagnosis of mental retardation requires all three prongs. But nothing, nothing in any of the evaluations, nothing in any of the rules suggest that you just do I.Q. testing only and then go no further.

In fact, in the DSM-IV-TR, it suggests to practitioners that the first thing that manifests is the adap-

tive functioning. So many times, you [21] can have someone with an 80 I.Q. that could be diagnosed as mentally retarded if the adaptive functioning is so poor. So the Court really needs to look at all the evidence in this case on the issue of I.Q. as well as on adaptive functioning.

Now, the state has referenced a number of cases here and in its—in its order [sic], and it's important to note that Dr. Prichard, who is the expert in this case, was the expert in *Cherry*. Dr. Prichard was the expert also in the *Brown* case. And some of the representations made by the state with regards to the analysis are important to bring to the Court's attention.

Dr. Prichard did an evaluation in one of these cases and the Supreme Court upheld his evaluation based only on I.Q. He did not go in and assess adaptive functions, because he didn't feel that the adaptive functioning at that point was going to warrant that diagnosis of mental retardation.

Now the difference is that in this case, Dr. Prichard has assessed his adaptive functioning. And the reason he's done that is because he felt it was necessary in order to testify before this Court on his I.Q. and on issues before this Court.

So, I would submit to the Court that those are [22] the reasons why it is important for this Court to hear the testimony on all three prongs in order for this Court to make a determination as to whether or not Mr. Hall is mentally retarded and, most importantly, whether or not what the Court is doing now is exactly the same thing and based on the same evidence that was before the Court in 1990. I would submit to this Court that the definition for mental retardation has not changed. What has changed is that *Adkins* came along,

and now, instead of a mitigator, it's become a bar to execution.

So I would submit to this Court that the evidence will show, the experts will testify that mental retardation is being diagnosed in the exact same way today as it was in 1990 when this Court heard evidence on the record as to the issue of mental retardation.

Now, the legal significance of it could be different, but the diagnosis and in terms of whether a person is mentally retarded or not remains the same. For that reason, your Honor, we would like to be heard on all the issues and not have the Court limit his presentation. There has not been a limitation to the presentation in other cases, all of these cases that have been presented [23] before other courts. I would submit if the Florida Supreme Court wants to limit its analysis and just look at I.Q. as it did in *Cherry*, that's up to the Florida Supreme Court. But by limiting his presentation now, your Honor, the Court would not be getting the entire picture with regard to this man's intelligence and all the expert information available for the Court to make a decision on this very important issue.

And, again, I apologize for not being so succinct here with regards to the presentation. But, again, the shutdown at the analysis should not occur here. This Court should allow all the evidence into the record and then at that point, this Court can make the correct determination when viewing all of the evidence with regard to this defendant. As has been represented before, there is a plethora of expert opinion testing and information in this case. And to limit it at this point would be a travesty in terms of the representations to the Court.

I submit to the Court that at one of the status hearings, the state tried to get the Court not to have this evidentiary hearing when *Cherry* first came out. And that's exactly what's [24] happening right now. The Court should allow him to have an evidentiary hearing and to present evidence to this Court on all three prongs, because they must all be met. The state and I are in agreement in order for the diagnosis to be achieved.

THE COURT: Counsel, you acknowledge three prongs?

MS. RODRIGUEZ: Yes, your Honor.

THE COURT: You acknowledge all three have to be met?

MS. RODRIGUEZ: Yes, your Honor.

THE COURT: You acknowledge that the burden is on the defense?

MS. RODRIGUEZ: Yes, your Honor.

THE COURT: You acknowledge that you have to prove your burden or meet your burden by clear and convincing evidence?

MS. RODRIGUEZ: Yes, your Honor.

THE COURT: So if you don't meet one of the prongs, the whole defense fails, right?

MS. RODRIGUEZ: Yes, your Honor.

THE COURT: And the most quantitative, clear prong is the one that talks about I.Q?

MS. RODRIGUEZ: Yes, your Honor.

THE COURT: So what is wrong with requiring [25] you to prove that first and then if you can meet that burden, then moving on?

MS. RODRIGUEZ: Your Honor, as I said before, the definition for mental retardation—the legal implications are different.

THE COURT: I'm not talking about the definition for mental retardation. I'm talking about the first prong, the one that says significantly subaverage general intellectual functioning. That is an I.Q. test, right?

MS. RODRIGUEZ: Your Honor—

THE COURT: That's the only way to prove that, right?

MS. RODRIGUEZ: Your Honor, I would submit to the Court that there is evidence in this record, there are a number of test scores with regard to his I.Q.

THE COURT: With all—I think that's what the state is saying. Put those in first. Let's see what you have got as far as I.Q. Then if you can meet that burden, then, obviously, we'll move on. But if you can't meet that burden, then it's over.

MS. RODRIGUEZ: Your Honor, I would submit to the Court that the expert cannot make the [26] determination of mental retardation without assessing both prongs.

THE COURT: I'm not talking about mental retardation. I'm talking about the first prong, Prong Number 1, that requires significantly subaverage general intellectual functioning—my understanding, correct me if I'm wrong. I don't claim to be an expert on this—that requires an I.Q. testing at 70 or below.

MS. RODRIGUEZ: Dr. Prichard is on the witness list and certainly could have been deposed by the state on this issue, your Honor. I, myself, am not an expert. But he is coming to testify that the score that Mr. Hall obtained in this test is still within the mentally retarded range. And his—

THE COURT: Is it 70 or below?

MS. RODRIGUEZ: 71, your Honor. And it has been 71 since this motion was filed.

THE COURT: 71 is not 70 or below, is it?

MS. RODRIGUEZ: True, your Honor.

THE COURT: Doesn't *Cherry* have a bright-line test that requires 70 or below?

MR. TATTI: (Nodding head.)

THE COURT: I mean, isn't that what it says?

MS. RODRIGUEZ: Yeah.

[27]

THE COURT: I think it's *Cherry*, there is a case, I could find it.

MS. RODRIGUEZ: That is *Cherry*. I tried to distinguish Mr. Hall's case for the Court as opposed to *Cherry*, because I think it's significant that Mr. Hall has a determination of mental retardation in the record, a factual finding that he was retarded then, and he will be retarded for life. That's something that cannot be ignored by the state or the Court in looking at his case, your Honor.

MR. TATTI: And that was the third part of my motion in limine. And I would urge the Court to enforce that one now. Because if we're going to hear over

and over again that the Court used the phrase "mentally retarded" in 1991, then we're going to be here for weeks. That issue is irrelevant.

THE COURT: That went up to the Florida Supreme Court already and has come back down, in this case, if I'm not mistaken. I mean, that, you raised, before we got to the evidentiary hearing.

MR. TATTI: That is correct.

THE COURT: And we tried to distinguish it. It went up, they said no.

[28]

MS. RODRIGUEZ: Your Honor, the issue is double jeopardy and whether or not Mr. Hall would subject himself to double jeopardy.

THE COURT: *There is a huge difference between a mitigator found 19 years ago prior to Adkins* even being thought of and the specific requirements under the statute and the rule in Florida that now have evolved from the *Adkins* ruling. I mean, those are huge differences. There is no—I mean, it's not even close.

MS. RODRIGUEZ: Your Honor, my position on the subject is that the Court should allow the defense to put on the evidence and then the Court certainly can make that determination at the end of the presentation of all of the evidence. My position is that making that presentation at this point is premature in terms of Mr. Hall's case.

THE COURT: Well, I mean, if the state wants to speak further, I will let them speak, but ...

MR. TATTI: Just quickly, to address a couple of issues.

THE COURT: All right.

MR. TATTI: Ms. Rodriguez suggests that Mr. Hall is different than Mr. Cherry, in that Mr. Hall, in his past, had an I.Q. score below 70. [29] I would suggest that statement is false. Cherry also had an I.Q. score below 70, among many, just as Mr. Hall has had many intelligence tests. I would refer the Court to Page 11 of the *Cherry* opinion. It's Page 11 on the West printout; it would be Page 712 in the official recorder. But Footnote 6, the court addresses the numbers of I.Q. tests that Mr. Cherry had, and it includes a score of 68 on a beta test, which interestingly enough is the same variation of tests that Mr. Hall ended up with a score below 70.

This very argument, the idea that the Supreme Court, when in *Cherry*, said the statute says two standard deviations below the mean, that means 70 or below, and excluded any discussion of this plus-or-minus statistical variation that exists in another community. The other community is the mental health professional community. We're not in that community today. Today we're in a court of law, and that definition is very clear and does not accept statistical variation. The Supreme Court made that painfully clear in *Nixon*, which is the case that's primarily cited in my motion. I have a copy for the Court.

They called the defendant to task for [30] suggesting as the basis of their argument that the Supreme Court was wrong in deciding *Cherry*. Judge, this situation, the law of this situation cannot be clearer. And it is perfectly within the Court's right, as the administrator of the trial of the facts of this hearing, to decide how the evidence will be presented. And I simply suggest to the Court a procedure that is efficient and legal un-

der the existing case law and under the statute. That is that the Court require the defendant to prove by clear and convincing evidence that his I.Q. is 70 or below before entertaining evidence on any other issue. Because I submit if they can't, the other issues are irrelevant. And I further submit they can't, because the report they attach to their pleading says his I.Q. is 71.

And just for what it's worth, back when Mr. Pinkard was attached to Mr. Hall, he filed a notice of supplemental authority on the issue of whether or not the Court's prior finding in the sentencing order regarding Mr. Hall and his mental status—he filed a notice of supplemental authority on the case of *Bies v. Bagley*, which at that time appeared at 59 Fed.3rd 324. It was a 2008 opinion from the Sixth Circuit, U.S. Sixth [31] Circuit. Well, your Honor, that case, if you will look in my motion in limine, on the third issue, was reversed by the United States Supreme Court, which very clearly distinguishes the two issues, the issue of mental retardation for mitigation purposes and the issue of mental retardation as eligibility to be executed.

They are two different concepts. And I would ask the Court to direct counsel to cease and desist from the further reference to your Honor's pronouncement in the sentencing order because it is irrelevant in this proceeding.

THE COURT: Well, as to the last point, I have said that. I'm not going to tell them how to try their case in that regard. But I have said that; I have written that; the Supreme Court, I believe, has approved that; and I think it's an exercise in futility for them to continue to raise it. However, that's your theory of the case. I'm not going to prevent you from doing that.

However, I just point out that it's wasted on me because I recognize the difference.

Now, counsel for the defendant have anything else?

MS. RODRIGUEZ: I have nothing further, your [32] Honor.

THE COURT: All right. Evidence code—Florida Evidence Code, specifically 90.612, grants to the Court the right to control the mode and order of an interrogation and presentation. And it says the judge shall exercise reasonable control over the mode and order of the interrogation of witnesses and the presentation of evidence. Then it goes through the various reasons.

I think we've all agreed that there are three prongs. They all have to be proven. Failure to prove any one is fatal to the defense. They have to be proven by clear and convincing evidence.

Quantitatively, the most straightforward of the three prongs is the first one that requires significantly subaverage general intellectual functioning. That essentially, as I understand it, per *Cherry*, requires an I.Q. test of 70 or below. I'm going to grant the state's motion in limine to the extent that I want the defense to first put in evidence of being able to meet that prong. And once that is done, if that is done, then we'll see where that gets us. I am not trying to limit the state's presentation of their case in any way other than to say we all know what has to be done. And [33] if you can't do it, I don't want you to play charades and, you know, let's just go forward and do what needs to be done in an orderly manner.

MS. RODRIGUEZ: Your Honor—

THE COURT: And the first thing that needs to be done is prove the first prong.

MS. RODRIGUEZ: Your Honor, we understand the ruling of the Court. And we filed a list of witnesses with the state. And this matter was not brought to our attention until two days ago. The problem that exists, your Honor, is that realizing our burden in this case, we had asked the Court to take judicial notice. We had limited our witnesses in terms of presentation here. We're planning to call two lay witnesses and three experts.

Now, the experts, your Honor, have other appearances in other courts. Having said that, where we would like to have had Dr. Prichard here to testify today, Dr. Prichard was not able, due to a family matter, to come until tomorrow. So Dr. Prichard is not expected to testify until tomorrow morning. This was a two-day presentation.

THE COURT: What time is he scheduled for tomorrow?

MS. RODRIGUEZ: He should be in tonight. So [34] he can come first thing in the morning. But we had reserved two days for this hearing, and I apologize to the Court again. If this had come up at an earlier time and the ruling would have been made, we could have done something to change that. But we had planned this morning to call Dr. McClaren, who is going to testify generally in terms of mental retardation. There is not an evaluation that she has done on the client—but was going to talk about the process of mental retardation and put that evidence on the record—followed by two lay witnesses that were going to testify. Dr. Krop was coming in this afternoon. Dr. Krop had tested Mr. Hall, if the Court will recall—

THE COURT: I don't recall specifically.

MS. RODRIGUEZ: He had a 72 score with regards to Mr. Hall. That evidence is in the record at the resentencing hearing. And Dr. Krop was going to testify his opinion is consistent with Dr. Prichard's finding that Mr. Hall is mentally retarded. He was going to testify to that this afternoon.

Tomorrow morning we expected to put on Dr. Prichard. So Dr. Prichard would put on the evidence with regards to what is in his report; and [35] that is that, in his opinion, Mr. Hall is mentally retarded, your Honor. Expecting then we would rest the case, and the state would call their witness, Dr. McClaren. So that was the order of witnesses.

THE COURT: So that would leave the state tomorrow afternoon, essentially, to put on their expert?

MS. RODRIGUEZ: We would have Dr. Prichard in the morning, and it's not a long presentation, your Honor. They have one witness. I don't foresee my questions taking it past tomorrow. But that was my understanding of how our calendars were going to work through the next two days.

THE COURT: But for the state's motion in limine, who would be your first witness?

MS. RODRIGUEZ: Dr. Valerie McClain.

THE COURT: Is she here today?

MS. RODRIGUEZ: She is, your Honor.

(Whereupon, Dr. McClain raised her hand.)

THE COURT: Would she be able to talk about I.Q. tests in this cause?

MS. RODRIGUEZ: Your Honor, she did not test Mr. Hall. I was going to have this particular witness

speak with regards to the definition, if you will, of mental retardation and whether there [36] has or has not been any change in the law with regards to how mental retardation is defined, in terms of conducting evaluations.

THE COURT: Is this person a lawyer?

MS. RODRIGUEZ: She's—no, your Honor. She's talking about definition of mental retardation from the perspective of a psychologist.

THE COURT: Okay.

MS. RODRIGUEZ: She works, as well, with the department—the State of Florida with regards to the evaluations of mentally retarded individuals. So just to give an historical, if you will, your Honor, in terms of the definitions of mental retardation. General information, your Honor, not specific to any testing of Mr. Hall.

That was our intent this morning, followed by two lay witnesses, who are relatives of Mr. Hall, who would talk about adaptive functioning very briefly, as well, your Honor, because there has been a lot of evidence already in the record. And that was our order of witnesses.

THE COURT: These things that are in the record that you want the Court to take judicial notice of, do you have copies of those?

MS. RODRIGUEZ: We have—we asked the Court [37] to take judicial notice of the entire record. Now, we do have those pulled, your Honor, where we could produce those and show the Court specifically which ones those are.

THE COURT: Because this—again, we went through this, this morning. I thought it was clear. The entire file is—first of all, the file is a Sumter County file. We're in Hernando County. It's a neighboring county, same circuit, but we're in Hernando County. The file is approximately 27, 28 volumes, I believe, somewhere—it's in the 20s somewhere. We only have here, today, the last two volumes, which are—well, there must not be that many then, because I have 22 and 23 here. So there must be 23 volumes.

We decided after conferring with your office that we didn't need to bring all of the files over here today, and as long as you are going to provide authenticated copies that are not objectionable to the state, I don't have a problem with your concept of judicial notice, at least on that basis. But I want to make sure that you know we do not have the official court file in this building today.

MS. RODRIGUEZ: Yes, your Honor. I'm aware of [38] that, your Honor. And that would be for the purposes of the Court's consideration of the evidence in terms of documents and exhibits and that type of thing. We were not introducing any of those things again through witnesses.

THE COURT: Well, again, if you want to put something into evidence in the nature of judicial notice, and assuming it's something in a court file, you need to have it and then provide it. Because it wasn't my intention to go back and reread the entire resentencing case, which I know went on for approximately, if I remember correctly, a week or six days, back in 1990.

MR. TATTI: Yes, sir, that's my recollection.

THE COURT: So, as long as you have pulled and provided copies for the state of what you want me to take judicial notice of, I want you to understand we do not have the court file here other than the last two volumes.

MS. RODRIGUEZ: I understand, your Honor.

THE COURT: Now, in light of this explanation as to the witnesses and how they are scheduled and who they are and what they might be testifying about, what's the state's position?

MR. TATTI: Well, first of all, with regard to [39] Dr. McClaren and, whether or not the state—when and whether or not the state will present Dr. McClaren's testimony, frankly, at this moment, my best guess, your Honor, would be that I will not present Dr. McClaren's testimony. Because I—unless something alarming happens over the course of the next day and a half, I do not believe that it will become necessary. Dr. Prichard is very familiar with the history of Mr. Hall's intelligence testing. He summarizes it in reasonable fashion in his report.

I, frankly, as I informed the Court when I asked the Court to appoint Dr. McClaren, Dr. McClaren's original appearance in this case was to assist me in having access to materials that I would not have access to but for a psychologist providing them to me. And to conduct an overall assessment of the history of Mr. Hall's intelligence testing, which he has done from the records I received as purported to be the records that Dr. Prichard received. So I'm telling you at this point, there is a reasonable probability I will not call Dr. McClaren.

Now, with regard to the defendant's proposed order of witnesses, obviously, I've addressed the [40] issue of the two civilian witnesses, who I assume are members of Mr. Hall's family. My objection is until his I.Q. is established, that that's not relevant, and the Court has ruled in that regard.

With regard to Dr. McClain, I submit, your Honor, if Dr. McClain is being called to the stand to give a general opinion of what mental retardation is, I submit that is likewise irrelevant. The Court asked if she was a lawyer, because I gather the Court understood that continuing to waive the phrase "mentally retarded" around within the context of the Diagnostic and Statistical Manual IV Text Revision is not the issue in this hearing.

And while—whether or not a particular professional engaged in appropriate behavior in assessing someone's intelligence quotient, this may be relevant to that. But the finding as to whether or not Freddie Lee Hall is mentally retarded has nothing to do with the Diagnostic and Statistical Manual. It is a legal determination. And if Ms. McClain cannot say that she gave an intelligence test, her testimony is irrelevant to the first prong.

THE COURT: The Court's concern here is that [41] if, for some reason, the defense, despite your doubt, if the defense is able to demonstrate I.Q. below 70, such that it would at least arguably create an issue of the first prong, we're going to need to go forward, obviously, with the other prongs. If we simply wait and see if that happens, we are—it is possible we'll run out of time, because we only have two days set for this proceeding.

With that in mind, I'm wondering wouldn't it be a more prudent use of time—by the way, I know how long it would take for me to get another full day of trial, and it would be months. It would be sometime in April or May. I'm thinking that we should plow forward today in light of—or despite the state's very cogent motion in limine, just because if we don't and the defense is able to meet the prongs, we're going to run out of time. We're already 30 minutes before noon, and we have not gotten anywhere yet.

Now, I understand your—I don't think it's come in yet in the form of a motion, but your concerns about what the first defense witness would testify to—and you are correct, I do share those concerns because none of what was proffered sounded [42] relevant to what we need to determine here today and tomorrow. But my thought is let's go forward with somebody, and let's get going, because I didn't set two days aside just to do nothing and then come back in another three or four months and try again.

MR. TATTI: Yes, sir.

THE COURT: That's my thought.

MR. TATTI: As the Court was able to find in the evidence code, you are the one that decides how the evidence is to be presented. My motion in limine was simply the state's suggestion as to the most expeditious manner to do that.

THE COURT: And in an ideal world, it makes perfect sense. But in the ideal world, we wouldn't have all these people out there waiting and we could call them when we wanted. Apparently it's been set up so that one shows up one day and another shows up—I understand that that's necessary in this practical world. I

think we need to do what we can do and hear what we need to hear. And I would ask that the defense try to keep it on point. I think we know what the law is. We need to keep it within the reasonable parameters of the law and keep it on point.

[43]

And state, obviously, I know you don't need any encouragement from the Court, but if you think that they have varied from the relevant issues, then please make an appropriate objection.

MR. TATTI: Yes, sir. And I understand the Court's—how we're going to proceed. I would just ask that the record be clear that the Court has granted the state's motion in limine regarding—

THE COURT: I have.

MR. TATTI: —regarding the order.

THE COURT: I have. I would grant it on all three points. You made three points, I have looked at them all, and they all seem to be accurate statements of the law to me.

MR. TATTI: I just want the record clear that that is what has occurred. I understand what the Court's intention is with regard to the civilian witnesses. I would only ask that the Court make it clear for the record that you are going to allow the presentation of those witnesses, if you will, out of turn, and I would ask that they be proffered and in the form of a proffer, because the preexisting condition has not been met at this point, that is, the establishment of Mr. Hall's [44] intelligence quotient. I just want the record clear.

THE COURT: I did grant—I am granting the motion in limine in all three parts. I think it's we'll taken.

I think it's an accurate statement of the law. As I said, it's a practical problem now that all the witnesses we want are not here; some won't be here until tomorrow. So I think we need to do what we can do with what we have or we run the risk of running out of time and then delaying this case further. And I don't think that's what anybody wants us to do.

MR. TATTI: Yes, sir.

THE COURT: With that being said, Counsel, I want you to call, and in light of what the Court's ruled, call your first witness and let's try to get something going here.

MS. RODRIGUEZ: Yes, your Honor. The defense would call Dr. Valerie McClain.

DR. VALERIE McCLAIN,

the witness herein, being first duly sworn, was examined and testified as follows

THE WITNESS: I do.

[45]

DIRECT EXAMINATION

BY MS. RODRIGUEZ:

Q Good morning, Dr. McClain.

A Good morning.

Q Can you please state your full name for the record?

THE COURT: And spell for the record both your first and last names, please.

THE WITNESS: Certainly, your Honor.

Dr. Valerie, V-A-L-E-R-I-E, R, period, McClain, M-C-C-L-A-I-N.

BY MS. RODRIGUEZ:

Q And what is your profession?

A That of a licensed psychologist in the state of Florida, Georgia, and North Carolina.

Q And can you please tell us your educational background as it relates to neuropsychology and other specialties?

A Certainly. I received my bachelor's, master's, and doctoral degree from Florida Tech in Melbourne, Florida. I completed my internship at Portland VA Medical Center and then completed a post-doctoral fellowship in neuropsychology and rehabilitation at the Rehab Hospital of the Pacific in Honolulu, Hawaii. After I completed my fellowship, I [46] went on and became employed as a licensed psychologist working in the areas of neuropsychologist and also rehabilitation.

Subsequent to that, I engaged in private practice in the area of forensic psychology and clinical psychology in the state of Florida beginning in 1994. Since that time, I've worked in the areas of neuropsychology and forensic psychology. At present I am employed in a neurology firm part-time, 34 hours a week, and I also own my own private practice in forensic psychology.

Q And you are certified?

A Correct.

Q In the state of Florida?

A Correct.

Q Have you published any articles?

A Yes, I have.

Q And can you tell us how many times you have been qualified to testify in court?

A Yes, I've been qualified over 600 times in court to testify.

Q How many of these have been criminal cases?

A Approximately 450.

Q Of those, how many capital cases have you testified in?

[47]

A I've testified in approximately four capital cases.

MR. NUNNELLEY: How many, I'm sorry?

THE WITNESS: Approximately four, sir.

BY MS. RODRIGUEZ:

Q Have you testified for the defense and the state, or what's the breakdown on that?

A In the capital cases specific to testimony, I've testified once for the state and three times for defense.

Q And do you attend continuing education courses in maintaining your license?

A Yes, I do. Annually, I attend at least 20 hours of continuing education, typically in the areas of forensic and neuropsychology.

Q Have you been recognized as an expert in clinical psychology with a subspecialty in clinical neuropsychology?

A Correct.

Q Have you ever failed to qualify as an expert?

A No.

Q And Dr. McClain, have you ever been qualified as an expert in mental retardation?

A Yes, I have.

Q How many times?

[48]

A In capital cases, as far as the death penalty cases, one time. In the pretrial, also one time, and that would be in Sarasota or Manatee County. So two times total; one would be post-conviction, one would be pretrial.

Q Were you able to claim mental retardation as a subspecialty?

A Yes, based upon both my clinical practice and also the evaluations.

Q In the course of your clinical practice, have you had occasion to work with the Agency for Persons with Disabilities in the state of Florida?

A Yes, I do.

Q And are you familiar with the agency's guidelines for benefit eligibility under the category of mental retardation?

A Yes, I am.

Q Dr. McClain, I'm going to show you what's been marked as Exhibit C for identification. It's a copy of ...

(Whereupon a discussion was had off the record between opposing counsel.)

THE WITNESS: Yes.

BY MS. RODRIGUEZ:

Q Is that a fair and accurate representation of [49] your credentials and your CV?

A It is.

(Defendant's Exhibit C identified for purposes of the record.)

MS. RODRIGUEZ: Your Honor, at this time I would like to move Dr. McClain's CV into evidence and tender her as an expert in clinical psychology with a subspecialty in the areas of neuropsychological, mental retardation—forensic, neuropsychological assessments and mental retardation.

THE COURT: Let's do it one step at a time. First, the CV, you want to offer that into evidence?

MS. RODRIGUEZ: Yes, your Honor.

THE COURT: Any objection to that?

MR. TATTI: Yes, sir, it's hearsay.

THE COURT: That it is, but it's hers.

MR. TATTI: Well, notwithstanding the fact that it's hers.

THE COURT: Your name is—a person's name is technically hearsay, isn't it? Because you don't know what it is until someone tells you?

I mean, seriously, are you objecting to the CV?

[50]

MR. TATTI: To the introduction of the curriculum vitae, yes, sir. I'm not going to oppose Dr. McClain being recognized as an expert by the Court, because I

think she's established grounds for the Court to do that. But admitting the curriculum into evidence is inappropriate because it's hearsay.

MS. RODRIGUEZ: Your Honor, we laid the proper—

MR. TATTI: It does not tend to prove a material fact in this proceeding.

THE COURT: Then it's not hearsay. It's not offered—well, I mean—

MS. RODRIGUEZ: Your Honor, the fact—

THE COURT: Seriously, I have never heard anyone object to that.

MR. TATTI: I never heard anyone offer to admit a CV.

THE COURT: I've seen it done many times.

MR. TATTI: In a criminal case?

THE COURT: I don't know about that.

MS. RODRIGUEZ: In post-conviction work, it's done all the time.

MR. NUNNELLEY: That's irrelevant.

THE COURT: Is there anybody in particular in [51] there that—

MR. TATTI: No, sir—

THE COURT: —do you want.

MR. TATTI: —it's the principle.

THE COURT: Do you want to voir dire?

MR. TATTI: I have two questions or one question.

THE COURT: You want to voir dire on that?

MR. TATTI: Not the CV but—

THE COURT: Okay.

VOIR DIRE EXAMINATION

BY MR. TATTI:

Q Dr. McClain, you indicated you have been recognized twice, I believe, as an expert in the area of mental retardation?

A With respect to capital cases, sir.

Q When was that?

A That would have been the *Pompey* case. That would be the pretrial and that was in approximately 2005. And then also in the Paul Brown case.

Q When was that?

A I believe that was in—I can check the record that I have here. I think it was 2004.

MR. NUNNELLEY: Can we get the middle name for—of the Paul Brown for the record? We have [52] two Paul Browns on death row.

BY MR. TATTI:

Q Do you know his middle name?

A No, I don't, not off hand.

Q Do you know what jurisdiction the case was in?

A Did you want me first to get the date? I'm just looking for you.

Q Yes, ma'am.

A 2003, Hillsborough County.

Q That's Paul Brown?

A Correct, sir.

Q You said the other case—

A That was *Pompey*. That was in Manatee County, 2005.

Q In 2005?

A And those were just the capital cases. But as far as qualifying as an expert in mental retardation cases, it goes beyond the capital cases.

Q But you said there were two, those were the two?

A The capital cases, yes.

MR. TATTI: I don't have any other questions.

THE COURT: Still object to the introduction of the CV?

MR. TATTI: Yes, sir.

[53]

THE COURT: I'm going to overrule that objection and allow the CV into evidence as Defense Exhibit 1.

(Defendant's Exhibit 1 received in evidence.)

THE COURT: And Mr. Tatti, the state has no objection to the qualification of the witness?

MR. NUNNELLEY: Give us just a minute, Judge?

MR. TATTI: As an expert in the field of clinical psychology? No, I have no problem with that. If the Court was inclined to find her an expert in the area of mental retardation, yes, I would have a problem with that.

THE COURT: Thank you for specifying that. All right. Counsel, you may proceed.

BY MS. RODRIGUEZ:

Q Dr. McClain, who retained you to work in this case?

A I was retained by CCRC, Capital Collateral, Carol Rodriguez.

Q What were you asked to do in this case?

A I was asked to examine documentation that pertained to the issue of mental retardation for the defendant Freddie Lee Hall.

Q Can you describe what information you gathered or reviewed in preparation for your testimony?

[54]

A Certainly. I reviewed the prior psychological evaluations, including testing conducted on Mr. Hall. I reviewed academic records that were provided. I reviewed basically the prior transcript of the trial proceedings and also reviewed additional information including medical records.

Q Are these the types of records that you normally rely upon and are relied upon by experts in your field?

A That's correct.

Q What is the American Association of Mental Retardation, referred to as the AAMR?

A It's an association dedicated or committed to basically providing services and safeguarding essentially the rights of individuals who are mentally retarded and also administering the services and setting the standards.

Q And the American Psychiatric Association, is that a different group?

A The American Psychiatric Association would not be an association that I'm affiliated with. That would pertain more to psychiatrists who are practicing.

Q Have these groups developed definitions for defining mental retardation?

A Yes, they have.

[55]

Q If so, what is that definition?

A Basically, it's three-prong. It's that when they there is subaverage intelligence relative to the normal person, meaning that it would be two standard deviations below the norm established as average. Secondarily, that there is significant adaptive deficits in several areas of functioning, such as social community, functional skills. And also, three, that there is evidence of these difficulties prior to the age of 18.

Q And how are those definitions used by clinicians and psychologists?

A Essentially, as a clinician or a practitioner, the definition would pertain more to the Diagnostic and Statistical Manual utilized by psychiatrists and psychologists. There are different definitions and different standards, for instance, for the Agency for Persons with Disabilities who have very strict criteria standards, meaning that they establish essentially a cutoff point and then they look at the adaptive deficits in combination.

Q What is the Diagnostic and Statistical Manual specifically?

A Some people call it the bible of psychiatrists and psychologists. It's used to specifically reference [56] a diagnostic category of mental illness or a clinical condition or syndrome and then look at criteria that allow you to establish that that disorder exists.

Q Does that particular manual define mental retardation?

A Yes, it does.

Q Is that definition different from the one you just provided as far as the AAMR and APA definitions?

A It's not different with the exception that I think it mentions that from the standpoint of a psychologist's training, that they have what they call a standard error of measurement that's taken into consideration as opposed to, for instance, different definitions that don't take that into consideration.

Q Are you required to use the diagnostic manuals when you evaluate for mental retardation?

A Yes, as licensed psychologists we are required, or I am certainly required, to utilize the definition that's provided in the DSM or the diagnostic and statistical manual.

Q Are you familiar with Chapter 393 Florida Statutes?

A Yes.

Q And that is dealing with what population?

A Basically those with mental disorders, [57] including developmental disabilities such as mental retardation.

Q How are persons diagnosed as far as mental retardation is concerned under that particular statute?

A Well, essentially, that would pertain more to the Agency for Persons with Disabilities. And basically, their current standard for establishing mental retardation would be that the individual has a subaverage intelligence, essentially 70, and that they have significant adaptive deficits and that there was evidence of those problems prior to the age of 18.

Q And in the course of your work, you have evaluated children through the school system?

A Yes, I have.

Q And how are they referred to you?

A Typically, they would come through the office of social security disability or through the schools, themselves, when there is a need to identify specific developmental problems including the possibility of subaverage I.Q.

Q How long has this type of system been in place in the state of Florida?

A Certainly, since I've been practicing. Since I've been practicing in Florida, since '94, but to my knowledge in affiliation for the agency with the Agency [58] for Persons with Disabilities even prior to '77.

Q Is it statewide or county specific? Are there variances?

A I'm mostly familiar with Florida in the areas of Pasco, Pinellas, and Hillsborough, which is the consistent type of standards.

Q What tests are normally administered?

A Essentially for intelligence, they prefer the more comprehensive intelligence tests such as Stanford-Binet, Version IV; also the Wechsler Intelligence

for Children or Wechsler Adult Intelligence Scale, and that would be—currently, they are at Version IV.

Q What criteria is required for placement into special classes for these children?

A Well, what would happen is essentially you would submit the results of the testing and there would be staffing through an individual education plan. At that point, they decide based upon the testing, behavioral issues, and mental issue, what would be the most appropriate avenue for the children to learn from. For instance SLD would be slow learner as opposed to educatably [sic] mentally handicapped, if they determined that they had, like, mild mental retardation.

Q In a review of the records in this case—you [59] reviewed some school records with regard to Mr. Hall?

A Correct.

Q And did you see any information with regard to testing, any I.Q. testing conducted of Mr. Hall in any of those records prior to age 18?

A No.

Q Was there any evidence that Mr. Hall was in any special classes?

A Not to my knowledge. It suggested he was slow and had difficulties with comprehension. But there was a referral but not a placement.

Q What was the criteria being used for eligibility based on a diagnosis of mental retardation, if you know, in 1963, prior to Mr. Hall's 18th birthday?

A Essentially, historically, there was a change in the Agency for Persons with Disabilities standards. In 1977, they went from using and assuming a one stand-

ard deviation, which would have been 84, 85, I.Q., and went to two standard deviations. So at the time, in 1977, historically, it changed so that adaptive deficits were a constant, but the I.Q. changed from being one standard deviation for admission in consideration as mental retardation to two deviations. So, essentially, in '77, there was a transition to it being 70.

Q When the statute was modified and the change [60] was made, what happened to those people that were in the borderline range?

A The individuals in the borderline range essentially were grandfathered in, meaning that the services that had been extended to them would continue for them and they would not be excluded.

Q When conducting an evaluation for mental retardation with regards to developmental services, do you have to use certain tests? I believe you mentioned the one preferred. Are there a variety of tests?

A There is a variety, but I think the scope is very limited actually and goes to the issue of well-established objective tests that have norms and reliability and validity that are acceptable.

Q Are there specific tests recommended for the testing of adaptive behavior?

A Yes.

Q How is that adaptive behavior defined?

A It's defined—of course they are going to ask questions with regard to communication skills, social skills, functional skills, such as safety, the ability to operate in their environment, as well as questions pertaining to work.

Q As far as the adaptive behaver is concerned, what specific tests—are they stated in the statute or [61] in rule?

A Yes, there are specific tests that are stated in the statutes and also through the Agency for Person with Disabilities that would include tests such as Vineland Adaptive Maturity Scale and also the Adaptive Behavioral Assessment System.

Q When conducting an evaluation for mental retardation for developmental services eligibility, if an individual should test over 70 on an individually administered intelligence test, are you authorized to stop the evaluation procedure?

A Well, essentially, this is something that I've interviewed both with the senior human service counselor Polly Young, as well as one of the other specialists. It's very critical to be discretionary in how you approach the testing. If it is, say, a point difference or a two-point difference, then one can consider—has a license to consider the adaptive deficits and should consider the adaptive deficits. If the I.Q. should be, for instance, high in the 70s or closer to 80, it's more a judgment call that might not be made.

In other words, it has to be very close to the cutoff because they are fairly stringent as far as using a 70 at this point. However, with a 70 or 71, 72, if there is evidence that there is significant adaptive [62] problems, then they can have some margin for including that person.

Q So hypothetically, if you were evaluating Mr. Hall's eligibility for developmental services and his I.Q. was a 71, are you required to assess his adaptive behavior?

MR. TATTI: I object to the relevance of that.

THE COURT: What's the relevance, Counsel?

MS. RODRIGUEZ: Your Honor, I'm trying to establish the guidelines in terms of Mr. Hall's placement in terms of the special education classes and where he would have been had there been a formal evaluation done at the time he was in school. There is evidence in the record with regard to part of the work being done but not all of it. So I asked a hypothetical question with regard to that.

THE COURT: Go ahead.

MR. TATTI: I was going to say even based on the questions that have been asked and answered to this point, the witness has indicated the standard completely changed in 1977.

THE COURT: And the only standard that's relevant to the Court is the standard set forth in the criminal statute and in the criminal rule, all [63] as set forth in *Cherry* and its progeny.

MS. RODRIGUEZ: I understand.

THE COURT: What might be the rule somewhere else or what might be the standards in some other setting are really not any relevant issue that's germane for consideration by this Court. And so I will sustain the objection. I think we're just going too far afield.

BY MS. RODRIGUEZ:

Q Are you familiar with a Rule of Criminal Procedure 3.203?

A Yes.

Q And the definition of mental retardation in that statute?

A Yes.

Q Can you tell us if there is a difference between that definition and the definition contained in the other—the other definitions, if you will, that we've talked about today?

MR. TATTI: Your Honor, I would object because I'm not sure at this point this witness has been qualified as an expert such that she would be in a position to give opinion testimony on the difference between a legal definition as opposed to a definition that's relevant to her field.

[64]

THE COURT: And it doesn't matter. I mean, what matters is does Mr. Hall meet the definition that's in the rule and in the statute and in the case law that's before the Court, not whether he might meet some other standard. That's irrelevant.

MS. RODRIGUEZ: I understand, your Honor. We're attempting to establish that before the rule, Mr. Hall met the criteria for the rule that was subsequently enacted. There was no rule at the time that Mr. Hall was in school, and we're just trying to establish that, had he been evaluated, Mr. Hall would have received an entire evaluation of both his I.Q. score and his adaptive score. And that's what we're trying to establish for the record. Again, it was prior to the Court's ruling today, your Honor.

THE COURT: Mr. Tatti?

MR. TATTI: That is irrelevant. How he would have been treated as a child if the rules were different in 1963 is completely irrelevant to the issue we are trying to determine today.

THE COURT: It's speculative, conjectural; it's just not relevant. I mean, I understand your dilemma, if you will. But, I mean, it's just—I will sustain the objection. It's irrelevant.

[65]

MS. RODRIGUEZ: I have no further questions.

THE COURT: All right.

MR. TATTI: No questions.

THE COURT: May this witness be excused?

MS. RODRIGUEZ: Yes, your Honor, she may be excused.

THE COURT: Thank you very much for coming in today. You are free to go about your business. If you are under subpoena, you are released.

THE WITNESS: Your Honor, thank you. I appreciate it.

THE COURT: Thank you. Who would be your next witness if you have one now and how long would they take, approximately?

MS. AHMED: The next two witnesses are family members, Mr. Hall, Mr. Lugene Ellis, and Mr. James Hall. I would estimate maybe, depending on how far we're allowed to go, maybe 30 minutes.

THE COURT: For both or for each?

MS. AHMED: For each.

THE COURT: Let's try the first one and see what happens. Pick one, either one, and we'll go.

MS. AHMED: Can we call Mr. Lugene Ellis?

THE COURT: Lugene Ellis?

MS. AHMED: Yes, sir, it's spelled [66] L-U-G-E-N-E, E-L-L-I-S.

THE COURT: L-U-G-E-N-E.

MS. AHMED: Yes, sir.

LUGENE ELLIS,

the witness herein, being first duly sworn, was examined and testified as follows:

THE WITNESS: I do.

DIRECT EXAMINATION

BY MS. AHMED:

Q Good afternoon, Mr. Ellis.

A How you doing?

Q I'm going to need you to speak up so the court reporter can get down everything that you say and so that everyone can hear you, okay?

A Okay.

Q I would like you to state your name for the record, Mr. Ellis, and spell it for us.

A Lugene Ellis, L-U-G-E-N-E, E-L-L-I-S.

Q How do you know Mr. Freddie Lee Hall?

A Excuse me. Well, I knowed him from his birth. I'm his brother. We just got different last names.

Q Do you and Mr. Hall share a same father?

A Say again?

Q Do you and Mr. Hall share the same father?

A No, we have different fathers.

[67]

Q How much older? What's your age difference between you and Mr. Hall?

A Got to be 20-some years, because I'm 80.

Q So about 20 years?

A Right.

Q Let's talk about the early years in Mr. Hall's life, okay? Where was Mr. Hall born?

A He was born in western Florida.

Q And how many siblings did you have in the household?

A There was 11 head of us boys and girls, 11 kids.

Q And where was Mr. Hall in the sibling range? Was he the eldest, the youngest?

A Freddie?

Q Yes.

A He the youngest.

Q He's the baby of the family?

A Right.

Q And do you recall Mr. Hall's birth at all?

A Well, he was by midwife. He wasn't born in the hospital, he was midwife.

Q Did you live at the house when Mr. Hall was first born?

A Lived at the house.

[68]

Q Besides you, were the rest of the siblings living in the same house?

A Let me see. The oldest was living there in the same house except—except two of them, that's all.

Q Now, what are your earliest memories of Mr. Hall in terms of a child? How did he behave?

A Well, I remember him from—from his birth up until—I stayed right in the house until I was 16 or 17 years old. I'd go to Lakeland, stay with my sister, and I'd come backward and forwards from the house then.

Q Tell me how Mr. Hall behaved as a child compared to the other children.

A Well, he never did—he never was—act normal like the other children. He was a little different altogether. He just wasn't like the other kids.

Q What do you mean he was a little different?

A He'd do things different. He'd go up into trees and beat cans to keep you from going to sleep and busted out the back windows in the house from something coming after him. He was real scary or something. So he just wasn't normal like the other rest of the kids.

Q When you said Mr. Hall was afraid that something was coming after him, can you explain to us what Mr. Hall thought was coming after him?

[69]

MR. TATTI: Object to that.

THE COURT: Sustained.

BY MS. AHMED:

Q How often did Mr. Hall bust out the doors and think that something was coming after him?

A Whenever I was there, every night, he might bust out every night if he stay in there, because he ain't gonna stay in there, because something coming after him. He'd say something coming to get him.

Q So this happened almost every night?

A Right.

Q And do you recall any trouble that Mr. Hall had in his speaking or talking?

A Well, his—his language, he never couldn't speak too good. He'd speak foolish talk all the time, you know, he didn't have a good understanding or something. We just wouldn't pressure him too much because we didn't want to make him angry, or something. We sisters and brothers, you know.

Q When you say he didn't have a very good understanding, what you do you mean?

A He just wasn't normal like the rest of us. He could be misled. You could tell him something, and he could just be misled any kind of way, because he wasn't—he different function like the rest of us, but [70] we could understand him, because we was his sisters and brothers. And we would just go along with him.

Q Do you know a little bit about Mr. Hall's schooling?

A In his schooling, I don't want to say I know about his schooling. I know he went to school, but I don't know how he acted or how he was, the way he was. I don't know nothing of that.

Q Do you know if Mr. Hall was able to read?

A He couldn't read too good. And he can't write, because I can't understand his writing now if he write me a letter. I got all his letters, I can't read them.

Q So, even now, Mr. Hall can't read or write very well?

A I don't know about the reading. But I know he can't write. But, I believe, somebody in the prison system where he is tried to write my name down, because that be written out good. But the rest of the writing, I don't believe anybody could read it.

Q So you still have contact with Mr. Hall today?

A Right.

Q Let's talk about Mr. Hall and, you know, his work life. Okay? Do you know if Mr. Hall ever was able to hold any jobs?

[71]

A No, he used to work for me. I carried him up to New York to pick apples and cherries, and he wouldn't want to live in the place where the rest of the people lived. So I gave him a place of his own, because I had about 114, 125 head of people there. And he busted out and said something trying to get him and he wanted to be out where he could run all the time.

Q So the only job he had was picking fruit?

A Yeah, oranges here in Florida and fruit up in the north.

Q He didn't have any other jobs beside that?

A Not that I know of.

Q What does picking fruit entail, just that, picking fruit, nothing more?

A In New York, I just picked cherries, apples, peaches, and prunes. But in Florida, I run orange groves.

Q And did you ever have any trouble with Mr. Hall working, you know, picking fruit in the farms?

A When he picked fruit for me, I knew he was shaking grapefruit, because I paid by the box to shake grapefruit. He'd shake down about 10 or 12 trees, and he'd pick up around two or three trees and that's it. He'd say, I'm ready to move. I'd say, Well, what you going to do about all that fruit back there? He'd say, [72] That back there? I said, Yeah. You go back there and get that. Then I try to move. Because he would leave all that back there.

Q So he had trouble even doing that job?

A Yeah, but I tried to get out there and show him, because he was my brother.

Q All right. What about the money that Mr. Hall made from picking fruit?

A If he made money and you pay him on, say, three or four o'clock Friday afternoon, Saturday morning, I don't know where—what he'd do with it, he may not have one quarter. He be trying to borrow some money. He just couldn't—I don't know what he'd do with it.

Q And do you know if Mr. Hall ever had a checking account, any sort of—

A He never had no checking account.

Q Do you know if Mr. Hall was ever able to cook for himself?

A No, he couldn't cook. If he could cook, I wouldn't eat it.

Q So, you always had to have someone cook for him?

A Yeah, my mother. She tried to take care of him just like he was a baby.

[73]

Q And even, you know, when Mr. Hall was living with his mother and his family, did he ever do his own laundry?

A No, my mother did all that.

Q Could he do any of that?

A I don't know. I don't want to say. I wouldn't let him do mine, but I know she would never let him do that, she would do that.

Q Was Mr. Hall ever in charge of any of his siblings? Would he babysit?

A Say what now?

Q Mr. Hall, Freddie, did he ever—was he ever in charge of the other siblings or babysitting the children?

A No, he wasn't.

Q Why is that?

A He couldn't hardly take care hisself, how he going to take care of the other kids? They don't trust him to do nothing like that.

Q So, Mr. Hall could not even take care of himself?

A No.

Q Now, did Mr. Hall play any sports?

A I never did see him play, but he tried to play a little football. He used to be at the house and I [74] figured he was going to kill hisself. He would have his shirt off, practicing by himself, run and jump and catch on the chest on the ground. I said, Boy, something going to stick through you chest or something down in there. He's say, Oh, ain't nothing going to hurt me. You know, I was afraid for him all the time. But he never did get hurt.

Q And he would just doing keep doing this?

A Yeah, he'd keep doing. He called it practicing at home.

Q Now, I know you took Mr. Hall under your wing when you went up to New York. Do you know if Mr. Hall ever drove?

A No, he ain't never drove because I know I asked him to go out there and fill up a—check the oil in the tractor. So the guy was waiting for my boss, he came in and said, Mr. Ellis, that boy done put a whole case of oil in the tractor. I said, No, I just wanted him to check the oil. I went out there, and he done put so much oil in it run out the hole he be putting the oil in. I said, I thought I told you to—he said, You told me to fill the bugger up. He filled it up, too; put a whole case in it.

Q So, he couldn't even do that?

A No, couldn't trust him to do that.

[75]

Q Mr. Ellis, I think I asked you this before, but you still have—you still visit your brother?

A Yeah, we visit him.

Q And does he still have, you know, those same problems communicating with you?

A Well, when I go to visit him, he don't ever talk too much. One thing, I just tell him, You get all you can to eat. And, I don't know, I don't like the way he eat, you know, he just like (indicating) all the time. But he been doing that from birth, so I won't say nothing about it to make him feel bad or nothing. Just go ahead.

Q You said Mr. Hall used to have issues eating. Can you give us an example?

A What he used to do, he borrowed—my mother would buy a loaf of white bread. I couldn't understand it. He'd take and ball that whole loaf up in a ball and if you ain't got none, you ain't going to getting a slice of that because he would just sit there and eat all of that.

Q So, he needed supervision to eat?

A Yeah, he need supervision.

Q And he still has that problem?

A Right.

MS. AHMED: Judge, may I have a moment to [76] confer?

THE COURT: Sure.

MS. AHMED: Nothing further, your Honor.

THE COURT: Cross-Examination?

MR. TATTI: Yes, sir.

CROSS-EXAMINATION

BY MR. TATTI:

Q Good afternoon, Mr. Ellis.

A Good afternoon.

Q You said you are 80 years old?

A Right.

Q So you were born in 1929?

A Right.

Q And you testified that you left home when you were 16 or 17 years old?

A Yeah, I went to Lakeland.

Q You went to Lakeland. And Lakeland is what, 45 minutes, an hour away from Webster?

A About 45 minutes, something.

Q So you had your own place to live there in Lakeland?

A No.

Q No?

A I lived with my oldest sister, but I come back home every weekend. But I would go stay with her during [77] the week.

Q During the week, you were in Lakeland?

A Yeah, some parts of it. Now, I would stay home sometime, but I always call that my real home in Lakeland. But I be at my mother's all the time.

Q If you were born in 1929 and moved out when you were 6 or 7, that means you moved out in 1945 or 1946; does that sound about right?

A That don't sound just right. Might have been a little older, because I went in the Army September '48. I was in the home with my mother then. So I had to be older then.

Q Okay.

A Because, after that, it's when I went to stay at my sister's when I got ready to go in the Service. I be home on and off when I got my card to go in the Army and I went in the Service in '51.

Q But you would agree at the point you left home or were in the process of leaving home, that's the point at which your brother Freddie was born; is that right?

A Yeah, sometime around about.

Q So, he was an infant when you left the home? I mean, I'm just doing the math.

A No. Let me see now. When I left home, Freddie Lee was born then, because he was in the house, [78] because we used to get after him. But I left and went to Lakeland. But I didn't stay to Lakeland always. I moved back in the house with my mother.

Q From time to time?

A Yeah, because I stayed at my sister's about, I guess, seven or eight months or a year or something. I didn't like being in the house, then I would come back to my mom's and stayed there with my mother.

Q My point is, during that period of time, Mr. Hall, your brother Freddie Lee would have been a very small child, before school age, even, right?

A Yes, but let me tell you what happened.

Q No, I don't want you to tell me what happened. I'm just trying to figure out how old he was.

A I know. I know what you are saying. I understand what you are saying.

Q Okay. Was he a small child during that period of time?

A He was—he was a child. He wasn't grown.

Q Okay. Now, you have described this thing with him and the loaf of bread, right?

A Right.

Q And counsel asked you if he does the same thing now. Have you sat and had a meal with him in the Department of Corrections?

[79]

A Yeah, I sit there, we brought him food. We sit at the table and eat together with him.

Q Okay. Do they bring him a whole loaf of bread?

A No, they don't buy you no bread in the corrections. They got the canteen. They let me go buy him everything he could eat. He just sit there and eat like that.

Q He likes to eat?

A That's just the way he eat.

Q Okay. Your brother has been in prison since February of 1978; is that correct?

A Right.

Q Okay. And before 1978, he was in prison from 1968 until '73 or 1974 for the thing he got convicted for in Sumter County, right?

A I remember that.

MR. TATTI: I don't have any other questions.

THE COURT: Any Redirect?

MS. AHMED: Just very briefly.

THE COURT: All right.

REDIRECT EXAMINATION

BY MS. AHMED:

Q Mr. Ellis, did you ever lose contact with your brother Freddie Lee Hall throughout his lifetime?

[80]

A No. What I was trying to explain to him, I left home when I married. And I came right back and lived right beside my mother, right next door. She lived in that house and I lived in the next house.

Q So you lived right next door to him?

A Right next door to him.

Q Did you have contact with him while he was incarcerated?

A While he was incarcerated the first time?

Q Right.

A I went to visit him I think about three times.

Q And you were still having contact with him while he's incarcerated?

A Right.

Q So you have had some contact with Mr. Hall throughout his life?

A Right.

Q So you have been able to see him and observe him throughout his life?

A Right.

MS. AHMED: Nothing further.

THE COURT: Anything else?

MR. TATTI: No, sir.

THE COURT: May this witness be excused?

MS. AHMED: Yes, your Honor.

[81]

THE COURT: Thank you for coming in today, Mr. Ellis. You are free to go about your business. If you are under subpoena, you are released from that subpoena. What other witnesses did you say you had, another relative?

MS. AHMED: Yes, Judge, James Hall.

THE COURT: Then, Counsel, after—what other witnesses does the defense have today?

MS. RODRIGUEZ: Dr. Krop is expected to be in after lunch. He's in a murder trial this morning, your Honor.

THE COURT: What time are you expecting him?

MS. RODRIGUEZ: I was just asking the investigator. We have not heard. He's still in the courthouse in Daytona.

THE COURT: Still in Daytona?

INVESTIGATOR: I have no way of knowing.

THE COURT: But you have not heard?

MS. RODRIGUEZ: The office says he's still planning to come.

THE COURT: Counsel, do you anticipate the next witness will take about as much time as the last witness?

MS. AHMED: Yes, Judge.

THE COURT: Please call the next.

[82]

MR. NUNNELLEY: Judge, do you want me to see what I can find out about Dr. Krop's status?

THE COURT: As long as he's not waiting on us is my concern.

MR. NUNNELLEY: If he hasn't left Daytona—

THE COURT: I understand. That's why I'm not concerned. I would assume he would call once he's on the way, I would hope. And we have not heard from him, so he's at least two hours away, I'm guessing, two and a half, three.

MR. NUNNELLEY: I make that drive too often, Judge.

THE COURT: I'm sure you do. Please call the next witness.

MS. AHMED: Mr. James Hall.

JAMES HALL,

the witness herein, being first duly sworn, was examined and testified as follows:

THE WITNESS: Yes, ma'am.

DIRECT EXAMINATION

BY MS. AHMED:

Q Good afternoon, Mr. Hall. Mr. Hall? Good afternoon, sir, how you doing?

A Fine. How are you doing?

Q Fine. Can you please state your name for the [83] record and spell it out for the court reporter?

A I'm kind of hard of hearing.

THE COURT: That's what I was—thank you.

BY MS. AHMED:

Q Mr. Hall, can you state your name and spell it out for the court reporter?

A Bishop James Hall, J-A-M-E-S, H-A-L-L.

Q And let me know if you can't hear me. I sometimes go back to my soft voice. Mr. Hall, how are you employed?

A How do I ...

Q What's your job?

A What's my driving?

Q Are you a bishop currently?

A Yes.

Q How are you related to Freddie Lee Hall?

A That's my brother.

Q How many years apart are you?

A From childhood up, just four or five years older than him, so we come up together. Until he was somewhere around 18 years of age, we lived in the same house.

Q And you had that house with your other siblings?

A Yes, we have other siblings.

[84]

Q How many children were in the house?

A At the time, it was six of us in the house, at the time.

Q When Freddie was born?

A When Freddie was born? Well, at the time, it was—there was five of us at the time.

Q And if you can, do you remember Freddie from when he was born?

A When he was born? That was 1945.

Q What was his—can you describe to us how Freddie was as a baby?

A Well, as a baby, I was prescribed [sic] that he was a little different from the others. He wasn't really like normal. Like, you could tell there was something about him that it wasn't just a normal child, like.

Q Can you describe to us, what do you mean that he wasn't normal?

A Well, I mean he didn't act like the rest of them. He just acted different from the other children than the regular ones did or was.

Q What would Freddie do?

A What would he do? Growing up, he would be to himself most of the time. And then he would get frustrated because when he was growing up, trying to [85] speak, he couldn't speak. And then he would pound something, trying to get his words out as he wouldn't speak like rest of the kids could. So it would make him frustrated, so to speak, at the time.

Q So when Freddie couldn't speak, he would pound?

A Pound something, yes, trying to get his words out.

Q How long did he have this sort of problem in his kind of speaking?

A He had that problem way up until I imagine in his teens, because he still was kind of—stutter. He had that speech, that problem in his speech, in his teens.

Q And besides his speech, do you know if Freddie had issues with reading or writing?

A Rephrase the question again?

Q Did Freddie have problems reading?

A Oh, yes, he couldn't even read. He couldn't read. No, he couldn't read.

Q And what about Freddie in terms of writing?

A He couldn't write. Nothing you could understand. Reading, writing, that was out of the question, reading and writing.

Q But he could write but, like you said, it was [86] nothing you could understand?

A No, you couldn't understand it, no.

Q Do you still visit your brother now?

A Do I?

Q While he's incarcerated?

A Do I live with him?

Q Do you visit your brother incarcerated?

A Yes, I do.

Q His ability to read or write, is that still the same now?

A Now, it's the same, even though he write letters. But they lay around the house for some time, be-

cause I can't read them. I know my name is on the envelope, but the writing, you can't understand it. So I don't really hardly bother about trying to read it.

Q How is Mr. Hall's speech now when you go visit him?

A He talk when we visit him. His conversation is not like ours. He can't compete with us, on this level, the level that he's on, he—we understand him, but he don't understand us. So we just sit and listen as he talk.

Q So, he still has that same trouble?

A Yes, he had that problem, yes.

Q Now, as a child, do you know if Freddie was [87] able to ever bathe himself, look after himself?

A From a child, most of the older ones had to kind of stay after him, because he wasn't—he most likely wasn't capable of doing it. We would have to kind of stay after him.

Q When he got older, was he able to do it?

A When he got older, he didn't do as he should. Pretty much the same thing, he would probably go without even taking care of himself or staying after himself a lot of time.

Q How long did this go on?

A Well, that went on until I imagine the whole time he was there, we was in the house together, the whole time.

Q Okay. And Freddie used to like to play football, too?

A Well, he'd kick in the streets. We didn't have that in school at the time. But he—on the street side, he'd try to play football.

Q Did he know how to play football?

A No, he just know that's the name of the game, he just out there.

Q In terms—let me go back. In terms of schooling, do you know how Freddie did in school?

A Well, in school—you mean in his—

[88]

Q Start with the earlier years, when he first started.

A Well, in school, he wasn't—he had a low I.Q., if that's what you mean; his I.Q. was very low. He didn't—he was just in school, I would say, just in school, not knowing like the others, he didn't—he couldn't remember writing or—his I.Q. was so low, he was just there in school.

Q Do you know if he ever completed schooling?

A What?

Q Did he ever complete his schooling?

A No. Oh, if he did, they just put him up there. He didn't finish school, no.

Q Do you know how far he went in school?

A Well, I think somewhere around 11the grade, they got him up there somewhere around the 11th grade.

Q And at 11th grade, he still—

A No, he just moved him up to keep him from being behind and keep him with his class.

Q Do you know if Freddie has lived on his own?

A Not as I can remember living on his own. No, not as I can remember that he lived on his own.

Q Okay. Let's talk about jobs that Freddie did. What was—what kind of work did Freddie do?

A I can recall a job that he worked where I [89] worked at a rock mine, Florida Crushed Stone that was in Center Hill. He worked there at the rock mine.

Q What would he do in the rock mine?

A Mostly common labor, shoveling lime rock from under conveyer belts.

Q Did Freddie also pick fruit?

A Yes, he did, um-hmm.

Q Did he have any other jobs besides sort of general labor?

A Not a job. Nothing else that I can remember but the fruit and the rock mine anyway.

Q Okay. Let me ask you about Freddie and his driving skills.

A His driving?

Q Yes.

A I can't remember—I never been in a car with him or driving or what have you. I didn't know he could even drive. I never been in a car with him.

Q He never owned a vehicle as far as you know?

A Not as I know of.

Q He never had a driver's license?

A No, no.

Q Let me go back one step. You said Freddie had those jobs. Do you know what would happen to the money he would make?

[90]

A That's the thing. I couldn't tell what he ever did with his money. He'd get paid, like, on that Friday, and he'd be broke the next day. Otherwise, he give his money away mostly, just give it away somehow. He'd be broke.

Q Okay. Let's talk about Freddie, how he would interact with other people. Was Freddie shy? Did he have a lot of friends?

A Was he shy?

Q Yeah. When he was young, did he have friends his own age, or were they younger? Talk to me about that.

A You mean in his younger days, how did he respond or whatever?

Q Yes, sir.

A Well, I can recall in his younger days, coming up, he mostly would be to himself most of the time. And he'd be in an environment so none—by hisself all the time, sometimes talking to himself a lot of times. I recall most of the time, he would be sometime around with the—we had chickens and hogs. He'd be around the animals most likely, but being around us, he never did just be around us, he be to himself most of the time.

Q Did that change as he got older, into his [91] teenage years?

A As he got older, he never did—as he got older, he never did just be with us like he would be with the rest of them. He would be to himself most of the time.

Q Now that you are visiting him in prison, is he still that way?

A Well, he had an alternative then. We together there, just sitting and talking. As we sit and talk, he can't compete with us. His I.Q. level that we understand—what we do, we just listen at him and talk to him. But a lot of things he don't understand. So we know. We're aware of that. So we just sit and listen at him.

Q Does he ever make sense?

A Some things don't even make sense, what he be talking about. Sometimes he get his Bible and try to quote scriptures from his Bible. And I know the things he talk about don't even make sense, it's just something just to be talking about the Bible because he know I'm in that field. So he just be talking about the Bible but not knowing what he be talking about.

Q Okay. Could Freddie ever cook for him?

A Ever do what?

Q Could he ever cook for himself, food?

[92]

A He couldn't cook, he couldn't cook.

Q So his mother or the rest of the brothers and sisters would have to help him?

A Yes, right.

Q Just like they would have to help him get bathed and get clothed?

A Right. Yes, right.

Q Did Mr. Hall always live in his mom's house? He always lived in his mother's house?

A Yes, right.

MS. AHMED: Judge, may I have a quick moment?

THE COURT: Sure.

MS. AHMED: Judge, I have nothing further.

THE COURT: Cross-Examination?

MR. TATTI: Briefly, your Honor.

CROSS-EXAMINATION

BY MR. TATTI:

Q Good afternoon.

A Yes, sir.

Q You said your brother Freddie worked with you at Florida Crushed Stone in Center Hill; is that right?

A Right.

Q What did you do there?

A I was a operator.

Q And he worked there?

[93]

A As doing common work.

Q A laborer?

A Right.

Q And your brother Lugene, he picked fruit mostly for a living, right?

A Yeah, right, contracted out.

Q And you knew your brother worked with him picking fruit; is that right?

A Yeah, um-hmm.

Q Now you are aware that Freddie Lee Hall has been in prison since February of 1978—

A Right.

Q —is that correct?

A Right.

Q That's more than 31 years?

A Right.

Q Next February, it will be 32 years that he's been in prison?

A Yes.

Q How many times have you seen him?

A Many times, I can't recall.

Q How often do you go?

A I was just there about a month ago.

Q A month ago. Okay. How many times did you see him this year?

[94]

A This year, two or three times or more.

Q Two or three or more. Four?

A Maybe.

Q Maybe. How about the year before that?

A The year before that, I can't recall. But we just go so often to see him.

Q Okay. Every two or three months, something like that?

A No, I couldn't say every two or three months, but I know we would go see him because, personally, I go as I travel around the country. I do go to different places as my ministry and I go when I get the chance.

Q Okay. So if you are heading up in that direction of the state, you will stop and see your brother?

A We'll stop and see him every so often, me and my brothers and sisters will get together. But I can't give you the exact time.

Q In the neighborhood of two, three, four times a year?

A I assume that.

Q And that's been since February of 1978?

A Oh, yes, right.

Q Now, when he would come back and have court and he'd be at the Sumter County jail, you could see him [95] all the time; is that right?

A Yeah, when he come, when he come.

Q While he's been in prison, your visits have been limited?

A In the prison, it was limited, yes.

Q And you know he was in prison from 1968 until 1974 or 1975; is that right?

A Yes.

Q Did you go visit him in prison when he was in prison the first time?

A Yes.

Q How often?

A I can't recall how often.

Q That was a long time ago?

A Yeah, I know.

Q All right. Now, would it be fair to say that before your brother was convicted in February of 1978 and went off to prison, that your opinion of him is that he could not read or write?

A He couldn't.

Q But he does write you now, doesn't he?

A He writes something that I can't understand.

Q You can't read it very well, but it's words?

A No, I can't.

Q But it's words. I mean, he makes an attempt [96] to write you letters, and your problem with it is his handwriting; is that right?

A It understanding whatever he writes. You can't understand it.

Q And you know now he can read, isn't that true?

A I don't know that. He can't—he can't read.

Q He can't read?

A I don't think he can read.

Q So, he doesn't read to you out of the Bible that he's showing you?

A No. He try to quote scriptures.

Q How does he do that?

A I don't know. He tries to quote scriptures.

Q He tries to quote—

A What he think in the Bible.

Q What they mean?

A I know.

Q I know you know what they mean. But he tries to tell you that he understands what a particular scripture means?

A Yeah.

MS. AHMED: Objection. Judge, speculation as to what the client's thinking.

THE COURT: It's Cross-Examination, Counsel. He may lead. Overruled.

[97]

BY MR. TATTI:

Q So, he quotes scripture from the Bible to you and then talks to you about what he thinks it means?

A It's scripture that he quote. It's not written—as I said a few minutes ago, it's not really synonymous to what I know about scripture.

Q Okay. All right. Have you ever seen his cell?

A Have I ever seen him?

Q His cell, the place where he sleeps every night?

A No.

Q Do you know whether or not he has books in his cell?

A No.

Q But when he come—you come to visit him, he will have a Bible in his hand a lot of the time, right?

A When we come to visit him, we sits inside. And they got Bibles there inside the place where we visit him.

Q Oh, okay. So he'll reach up and grab a Bible?

A No, it's not a Bible off the shelf. We have it already—

Q Okay. But you don't know what he has in his cell? You don't know whether he has three or four [98] Bibles—

A No.

Q —books of poetry, legal books, things like that?

A No. That, I don't know.

MR. TATTI: Okay. I don't have any other questions.

MS. AHMED: Judge, I have a brief Redirect.

THE COURT: Brief?

MS. AHMED: Very brief.

THE COURT: Go ahead.

REDIRECT EXAMINATION

BY MS. AHMED:

Q Mr. Hall, let's talk about the letters—sorry. Mr. Hall, talk about letters that Freddie would send to you. Can you describe to us what would happen with his handwriting and how he wrote?

A What he said to me in his writing?

Q Does he write from left to right, or how does he write?

A I believe it's from—all together. There would be some all together there, all over the whole page. Like a normal person would write, he start at the top of it, all most of the time. And write all over the page, on the bottom of it. As he closing, you could [99] understand a little of it, but you just couldn't really understand his writing. So sometimes I wouldn't even bother trying to read his letters.

Q So, he didn't write like a normal person from left to right on a page?

A No. No, my goodness, no.

Q Does he write in a sort of circular fashion? Do the words turn?

A How do he write?

Q Yeah.

A Well, he just start out writing all over—not following the lines, just all over the page, the whole page is covered with writing, so to speak.

Q And you don't know whether or not your brother Freddie Lee Hall got these scriptures from anyone else in the prison system?

A That's what I'm thinking of. That he heard other people be together talking—I don't know. But I know you can pick up a lot of scripture like that from hearing others. But I don't know whether he read that or not. But I know—

Q So he's never read anything in front of you from the jail?

A No.

Q You don't know where he is getting this [100] knowledge?

A I don't know, no.

Q You don't know if someone is reading it to him or—

A I don't know where he get it.

MS. AHMED: Nothing further, Judge.

MR. TATTI: Nothing, Judge.

THE COURT: May this witnessed be excused?

MS. AHMED: Yes, sir.

MR. TATTI: Yes, sir.

THE COURT: Thank you for coming in today, Mr. Hall. You are free to go about your business. If you are under subpoena, you are released from that subpoena.

THE WITNESS: Thank you, sir.

THE COURT: All right. I propose that we take a break for lunch and I would propose, I'm thinking an hour. Is there any reason that's not appropriate? Should we take more or less? Anyone want to be heard on that.

MR. TATTI: I'm here until you tell me to leave.

THE COURT: Let's come back in an hour and we'll make it an hour five minutes. We will come back at quarter to 2:00. And we'll see what's [101] going on at that time.

Please, defense counsel, try to find out where your next witness is and when he might be here. Is that your only other witness for today?

MS. RODRIGUEZ: Yes, your Honor.

THE COURT: Okay. All right. Then we'll be in recess until quarter to 2:00.

(A recess was taken.)

THE COURT: Good afternoon.

MR. TATTI: Good afternoon, your Honor.

THE COURT: Is the defense ready to move forward and call their next witness?

MS. RODRIGUEZ: Yes, we are, your Honor.

THE COURT: All right.

MS. RODRIGUEZ: The defense calls Dr. Harry Krop.

HARRY KROP, Ph.D.,

the witness herein, being first duly sworn, was examined and testified as follows:

THE WITNESS: I do.

Good afternoon, your Honor.

THE COURT: Good afternoon.

DIRECT EXAMINATION

BY MS. RODRIGUEZ:

Q Good afternoon, Dr. Krop. Would you please [102] state your name and spell your name for the record?

A Harry Krop, K-R-O-P.

Q And if you could state your profession, please, sir?

A I'm a licensed psychologist in the state of Florida. I am the director of Community Behavioral Services, which is a private practice of psychology. I have offices in Gainesville and Orange Park, Florida.

Q And are you board certified, sir?

A There is no board certification in psychology. But, again, I am licensed in the state to practice clinical psychology.

Q Do you currently supervise and teach any interns, residents, or fellows in the course of your work?

A Yes. I'm in—I'm an associate professor at the University of Florida in the department of psychiatry. And my involvement with the department is to consult, lecture, and supervise the forensic psychiatric fellows in certain specialty areas, such as the evaluation and treatment of sex offenders and also evaluations of individuals who are charged with first-degree murder. I also do other things like teach them psychological and neuropsychological testing.

Q Have you published any articles, sir?

[103]

A I have probably about 30 or 40 published articles either in the professionally reviewed journals or chapters in some books.

Q Have you received any recognition or rewards for your work?

A I'm not sure I've—I was named a long time ago, when I was doing work for the Office of—actually, the Office of Disability. I was named as the—and I recognize I'm not a physician; I'm a psychologist. But they didn't have a psychologist of the year, so I was named physician of the year for certain things that I did sort of above and beyond the call of duty in their evaluations.

Q What associations or organizations do you belong or to or are you a member of?

A I belong to, I'm not sure I have a copy of my resume or vitae here. But I'm a member of the Ameri-

can Psychological Association and several different organizations involved with neuropsychology and various forensic associations, as well as the association for the treatment of sexual abuse, and then several Florida organizations such as the Florida Psychological Association.

Q Do you have any subspecialty in your area of psychology?

[104]

A I started the first sexual offender treatment program, the first treatment program for sexual abuse, back in 1977. I guess that would be one specialty area of mine. The other area would be forensic psychology. I've probably evaluated 20 or—2,000, maybe more first-degree murder suspects.

Q How many times have you been qualified, approximately, to testify in court?

A I'm sure over 1,000, between criminal and civil cases.

Q And of the criminal ones, how many would you say you have testified in?

A Probably about 800.

Q And how has the breakdown been in terms of your representation versus defense versus state?

A It depends on the type of case. I think if you look overall, I've probably tested maybe 45 percent for the state, 55 percent for the defense. But if we look at first-degree murder cases, it's been much more for the defense, probably about 90 percent in first-degree murder cases. Primarily since I do confidential evaluations and if I—if my opinions are not particularly helpful to the defense, then I just wouldn't be called at all.

So when I do testify, it would be for the most part for the defense.

[105]

Q Dr. Krop, do you attend continuing education courses to maintain your credentials and your license?

A Yes, I'm required to do that.

Q Have you ever failed to qualify as an expert?

A The only time—well, I was once not allowed to testify. And that was in a Federal case in the Virgin Islands, but that was in the area of witness identification, because it was deemed that that was not within the purview of my testimony. But I was not denied as an expert witness ever.

Q Have you ever been qualified as an expert in mental retardation in the courts of Florida?

A On numerous occasions. But generally, mental retardation is considered within clinical psychology. So I've testified on the issue on numerous occasions. I don't necessarily get qualified as an expert in mental retardation. Although, I actually started off my practice by—with a contract with the Office Of—I guess at that time, it was called The Office of Mental Retardation, and I did hundreds if not—well, I will say hundreds of evaluations of individuals with—now referred to, I guess, as a developmental disability.

Q Would you consider that a subspecialty of yours?

A Particularly at that time.

[106]

Q You have dealt with death penalty cases before?

A Yes.

Q Approximately how many mentally retarded individuals have you evaluated over the course of your career?

A Are we talking just within death penalty or—

Q Yes.

A Within death penalty, I'd say—I'd say maybe of the over 2,000, maybe 75 to 100 would be tested in the area that would fall within the clinical category of mental retardation.

Q How about individuals in general?

A Maybe four or five hundred.

Q Approximately how many times have you administered the Vineland Adaptive test?

A I haven't used the Vineland in a while. I used the Vineland early on in my career, probably maybe 75 times over the last few years, I have used the Adaptive Behavioral Assessment System referred to as the ABAS.

Q Dr. Krop, I'm going to show you what's previously been marked as Defendant's Exhibit 6 for identification. It's a copy of—

MS. RODRIGUEZ: I apologize, your Honor.

[107]

(Tendering document(s) to the state.)

MR. TATTI: CV?

MS. RODRIGUEZ: CV.

(Defendant's Exhibit E [sic] identified for purposes of the record.)

BY MS. RODRIGUEZ:

Q It's a copy of a CV and ask you to look it over if you would. Is that a current and accurate version of your CV?

A It appears to be accurate. It's not the most current. I think I have revised it once since then, but rather than some updated figures, it's accurate.

Q Thank you.

MS. RODRIGUEZ: Your Honor, at this time, I would like to move Dr. Krop's CV into evidence and tender him as an expert in clinical psychology, and I would also like to tender him in the area of mental retardation, as well. The state may wish to voir dire.

MR. TATTI: I don't have any voir dire. I have no objection to Dr. Krop being recognized as an expert in clinical psychology. And I suppose to the extent that he's going to testify in general about mental retardation, that's not a problem. I do object to the introduction of his CV.

[108]

THE COURT: Any particular reason on the CV that you want to place of record?

MR. TATTI: It's hearsay, your Honor.

THE COURT: Okay.

MS. RODRIGUEZ: If I might approach, your Honor.

THE COURT: I'm going to allow it into evidence and overrule your objection as to the CV. Note your comments as to his qualifications and his CV.

(Defendant's Exhibit 2 received in evidence.)

BY MS. RODRIGUEZ:

Q Dr. Krop, can you tell me how you got involved in the Freddie Lee Hall case?

A I'm trying to do this the best I can in terms of sort of retrospectively. I evaluated Mr. Hall, or I was asked to evaluate him back in 1990, I believe. (Referring to document.) At that time, I did an intellectual assessment of him, and I—again, I believe it was at the request of the Public Defender's Office in—I think it was Mr. Johnson or his, Miss—I believe it was Mr. Johnson. I think there were other public defenders working on the case. But it was Michael Johnson that asked me to get involved in the case.

[109]

Q Was this in preparation for a resentencing?

A I believe so, yes.

Q What issues were you asked to address?

A I was asked to do a general assessment of him to assess his competency, assess his mental state, specifically with regard to potential mitigating factors.

Q In addition to the initial evaluation—that was in March 1990. Does that sound correct?

A Yes.

Q Did you see Mr. Hall on another occasion?

A I saw him, according to the records I have, originally, March 15th, 1990. Then I saw him again September of that same year, September 25th, 1990.

Q And did you conduct an evaluation?

A Yes.

Q And where did those evaluations take place?

A I would say it would either have been at Florida State Prison or U.C.I. I don't recall.

Q Can you tell me what type of evaluation you did?

A I did the evaluation as if I were starting fresh with an individual who was facing the death penalty. I recall interviewing him. I recall doing the Wechsler Adult Intelligence Scale-Revised, which [110] probably would have been the most current WAIS at that time. I did other neurocognitive tests. I believe I had other neuropsychological testing that had been done by other individuals at that time. I know I read several depositions. I was provided with a transcript of his original sentencing. I had other psychological reports or affidavits. I do not specifically recall, but in reviewing my report and my testimony, I see that I also interviewed several family members.

Q Did you do a WRAT-R?

A I probably—yes, according to my report.

Q What is WRAT-R?

A Wide Range Achievement Test-Revised.

Q What does that measure?

A It's a basic achievement test assessment which measures a person's reading level, spelling skills, and arithmetic levels.

Q Did you perform a Wechsler Memory Scale?

A Yes.

Q What is a Wechsler Memory Scale?

A Wechsler Memory Scale would have been administered as part of the neuropsychological test bat-

tery to assess a person's immediate as well as remote memory.

Q Did you administer a Rey Auditory-Verbal [111] Learning Scale?

A Yes, that would be another measure of a person's memory and learning abilities.

Q Did you administer a Bender-Gestalt Test?

A Yes.

Q And what is a Bender-Gestalt?

A Bender-Gestalt is a—well, it used to be used as an assessment of organic brain damage. It's really simply a measure of a person's perceptual motor skills. It's usually a part of a total neuropsychological battery.

Q Did you administer Right-Left Orientation, Finger Tapping Test?

A Yes, those would be two different tests. Finger Tapping Test is a measure of a person's fine motor skills. And the Right-Left Orientation is part of measuring a person, whether he has any kind of aphasia or disorientation kinds of issues. Again, it's seen as part of a total neuropsychological battery.

Q And the finger localization test was administered, as well?

A Yes, that's also a measure of—it's also an assessment in a neuropsych battery.

Q I believe you mentioned that you had other reports, as well. Do you recall what reports and [112] testing materials you had?

A In looking at my report dated January 8th, 1991, and I noted that I had a report by Dr. Lewis, a

report by Marilyn Feldman, a report by Dr. Kathleen Heide, a report from Dr. Jonathan Pincus. A report by Dr. Jethro Toomer; a report by Dr. Barbara Bard; a report by Leslie Prichep, P-R-I-C-H-E-P; several affidavits Dr. Barnard, James Hill, Katie Glenn, Diana Mitchell, dash, Rigby—or Rigsby (phonetic). I also had an affidavit by the public defender Mr. Babb, and an affidavit by Richard Hagin (phonetic). I also reviewed other legal documents, various police reports, as well as Mr. Hall's school records.

Q You reviewed the trial testimony as well?

A Yes, as well as his DOC records, medical and administrative, which would be the classification records.

Q I believe you discussed some interviews you did with some family members?

A Yes.

Q Do you recall who those family members were?

A His oldest sister, Ethel Miller. I interviewed Katie Mae Glenn, who is also a sister. His brother James Hall. Deana Rigsby, his sister, and the Henry Ellis, who is another brother.

[113]

Q Are all those type background materials the ones you reasonably rely upon or experts in your field rely upon in conducting such evaluations?

A Yes, ma'am.

Q Were the other mental health professionals' reports important to you?

A Well, certainly, if I'm looking—again, the issue was more of a general one at that time in terms of po-

tential mitigating factors to be explored. So, yes, any prior psychiatric records or prior assessments would be relevant in my overall evaluation.

Q How much do you rely upon those other reports when you are doing an evaluation?

A It varies. It varies in terms of, for example, I look at it in terms of the history obtained and was the history obtained consistent with the history I obtained? I look at the qualifications of the persons doing the report. I look at the tests and whether they are the kinds of tests that I would also rely upon as far as my overall opinion. So it really varies from one report to another.

Q What did the previous psychological tests show Mr. Hall's functioning range to be?

A I think at that point, there were—I know I made some notes. I note that there was a evaluation [114] that was done in 1986 by a Marilyn Feldman, and she got an I.Q. of 80. (Referring to document.) I believe there were other reports that, for example, Dr. Heide, who is not a psychologist, and she did family interviews. Dr. Toomer, I don't recall him giving a specific I.Q. or doing a full test, but he did give an opinion that there was probably brain damage. The same thing by Dr. Lewis and her team.

So there were I.Q. tests that were in his records, I believe, but there were also some testing that was done by the people that I had reviewed their reports.

Q Were the tests administered by Dr. Lewis individually administered?

A Well, Dorothy Lewis is, I believe, a psychiatrist. But I think she had a team, and it looks like they were individually administered tests. But I'm really not sure.

Q You administered a WAIS-R, I believe you said?

A Yes.

Q If you will briefly state, what is the WAIS-R and what does it measure?

A Well, at the time—the Wechsler scales have always been recognized pretty much as the—probably the most relevant and best researched of all the tests [115] to give global assessment of a person's intellectual functioning because it measures both verbal and nonverbal areas. Then all the Wechsler scales have—I'm sorry. All the Wechsler tests have subtests which measure specific areas of functioning. At the time, the WAIS-R probably was the third test, third revision. Even though there is a WAIS-III, the WAIS-R was a revised version of the original WAIS at the time. So it's an individual intellectual assessment.

Q Did Mr. Hall appear to exert maximum effort during the testing process?

A It was my opinion that he did.

Q And did the results you obtained appear to be a valid estimate of his true intellectual ability?

A They did, yes, at the time.

Q Is there a standard within the medical practice of the psychiatric community for the diagnosis of mental retardation?

A Well, yes. I mean, there has always been a specific standard, a specific criteria. The Diagnostic and Statistical Manual has always divided up, as does the Wechsler tests, different levels of mental retardation with certain cutoff points in terms of the different levels and degrees of mental retardation.

Now the Diagnostic and the Statistical Manual [116] pretty much currently goes by the Developmental Disabilities Foundation as far as the criteria for a diagnosis of mental retardation. There has always been—it's always been important to distinguish between a diagnosis of mental retardation and the person's functioning level in terms of his intellectual functioning level. So we've always known that a person can function at a mentally retarded level based on I.Q. testing. But in terms of a diagnosis of mental retardation, that always, at least for as long as I can remember, involved more than just an I.Q. test. It would also involve an adaptive functioning assessment and also the determination that the mental retardation existed prior to the age of 18. So there has always been a distinction between the clinical level of functioning and a diagnostic definition of mental retardation.

Q Are you familiar with the definition for mental retardation that's contained in Florida Rule of Criminal Procedure 3.203?

A If that's the one that was applied, I guess, in the *Cherry* case, I would be familiar with it. I don't know the number.

Q And what is it?

A Well, it's somewhat similar to the Diagnostic [117] and Statistical Manual definition with the exception of, rather than the I.Q. score having some—or the examiner, I guess, having some flexibility with regard to the diagnosis based on an I.Q. score, which is plus or minus whatever the standard deviation or standard error of measure is on the test, my understanding from a legal standpoint is that the score has to be 70 or I guess below 70, as opposed to a particular I.Q., which may be plus or minus, let's say, five points.

Q And is that different than what's directed in the—in your statistical manuals?

A Yes. As I said, in the DSM, which is based on developmental disabilities criteria, the diagnosis of mental retardation can be given with an I.Q. score which could be higher than 70 if it falls within a standard deviation of that test, or standard error of measure of the test.

Q How is the adaptive behavior defined in the rule?

A Deficits—if I recall correctly, deficits—you are talking about the legal rule?

Q Yes, versus the DSM.

A I am not totally sure. I know the—as I usually have applied it, it would be significant deficits in adaptive functioning in at least three areas [118] of a person's functioning, whether it be social, communication, vocational, academic, and so forth.

Q How long have you known mental retardation to be defined in this manner?

A In the manner that it's legally defined? Only since—I guess since the ruling in the *Cherry* case.

Q And the clinical definition, how long has mental retardation been defined in that manner?

A Well, since I've been doing these assessments, which would be the '70s.

Q Have you evaluated other death-row defendants for mental retardation?

A I have evaluated individuals prior to—prior to their case being—gone to trial. And I've also evaluat-

ed, in post-conviction cases, other individuals for mental retardation.

Q How many have you—

A Post-conviction, probably three or four at this point. And, of course, pre-conviction, that would be part of a routine assessment that I was doing for possible mitigating factors, anyway.

Q How many times if you would, have you, approximately, been employed by the state versus defense on these cases? Any idea?

A Are we talking specific mental retardation [119] cases?

Q Yes. Sorry.

A Two of the three post-conviction, I was appointed by the Court. I wasn't hired by either side. And the other one, I believe the defense asked me to do an assessment.

Q Could you please describe for me the steps you took in conducting Mr. Hall's assessment to evaluate his intellectual functioning and the test, itself, that you gave him?

A Well, I—again, I'm going based on some notes in my own testimony. I do recall Mr. Hall's case. And I remember specifically having some difficulty, at least initially, because he was very difficult to understand. So I would have established rapport with him. I remember that he was pretty suspicious. He was basically initially concerned about who I was working for. I don't recall that time whether I was introduced to him by the attorney. Most of the time now, I ask, if I'm hired by the defense, for the attorney to introduce me to the inmate.

But I do believe from looking at my notes that rapport was eventually established. Then I would have gone about—usually the I.Q. testing is the first test that I administer so there is no real fatigue issue [120] involved.

Q Do you recall what the results of testing showed?

A The results were he obtained a verbal I.Q. of 70, a performance I.Q. of 79, and a full-scale I.Q. of 73.

Q Now, based on the DSM-IV-TR and your experience and training, are full-scale I.Q. test result scores approximate figures?

A Yes, that's why there is a standard error of measure. And also, of course, you look at standard deviations, but they're approximate in terms of we take into account that the person—there might be some conditions or circumstances that might cause the person to do worse than he is potentially capable of doing. And there may be some problems in terms of the administrator, things like that. So, in that sense, they are approximate, but they are considered reliable instruments.

Q Why is it recommended to take the standard error of measurement into account when evaluating these intelligence scores?

MR. TATTI: Your Honor, I'm going to object to the relevance of this. It's theoretical. The questions have no relevance to the inquiry being [121] made by the Court at this point based on the law as it exists in Florida.

THE COURT: Counsel, why should the Court allow this? It does seem to be outside the standards required in the case law and in the ruling statute.

MS. RODRIGUEZ: Your Honor, I'm questioning the witness as to the clinical evaluation of the defendant that was performed when he visited with him and gave him the test. And the way he performed the test was not in accordance with the rule; he did a clinical evaluation of the defendant. So the questions pertain to that particular evaluation of the defendant in 1990.

MR. NUNNELLEY: The test is the test.

MS. RODRIGUEZ: And the DSM, your Honor, the language in terms of the standard error of measurement is actually in the DSM language. So the questions are merely directed to the witness as to his evaluation that he conducted at that time.

MR. TATTI: And my response is the witness has already indicated that he understands there is a difference between the standard in the law and the standard described in the DSM. And to the extent we've ventured past the standard that is relevant [122] here, that is the standard of the law. This is irrelevant.

THE COURT: I agree. I will sustain the objection.

BY MS. RODRIGUEZ:

Q What is a confidence level?

A Confidence level takes into consideration probability that the score that's obtained falls between a—two scores. In other words, one that's typically lower than the score obtained and one that is typically higher than the one obtained. So, basically, there are scales in the test that show that—let's say, that have a 95 percent probability or confidence level, the score that you obtained—or that this person, if he or she is tested again—would fall between score A and score B.

Q Dr. Krop, what did you state as your findings related to Mr. Hall's I.Q. test scores?

A Well, I described him as being functionally retarded at the time. That was based on a combination of my I.Q. testing, my review of records, and my interviews with family members that showed that he had difficulty in almost all areas of his life in terms of adaptive functioning, school, occupational, social, involvement in criminal activity, and so forth.

[123]

So, at the time that I testified, I indicated that I thought he was—he would meet criteria for functional retardation. I also indicated that I thought he had a mental age of around 13, I believe at the time. And that was based on the I.Q. test score that I obtained.

Q In your review of Mr. Hall's background information you were provided copies of the resentencing proceedings and reviewed that information?

A Yes.

Q Including the school records I believe you testified?

A Yes.

MR. TATTI: Just to clarify, I believe Dr. Krop testified in the resentencing proceedings. So he wouldn't have had access to a transcript of something that occurred after his report. It would have been the original trial proceedings.

THE COURT: Yeah, I think he's talking about the original trial proceedings.

BY MS. RODRIGUEZ:

Q Well, in preparing for your testimony today, were you given an opportunity to review the sentencing proceedings?

A Yes, that's what I thought you meant with your [124] question. As I sit here today, I have reviewed the transcript of the sentencing and the resentencing.

Q And after completing your evaluation, Dr. Krop, were you able to give an opinion within a reasonable degree of medical certainty as to mitigating factors that existed in Mr. Hall's case?

A First of all, it would be psychological certainty. But—

Q Yes, I'm sorry.

A I—as a rule, I do not indicate that what I'm testifying for is, quote, mitigating factors. What I would do is testify with regard to my clinical impressions, my finding, my diagnosis, and then basically it would be up to the trier of fact to determine whether something is mitigating or not.

Q And what was that opinion?

A Well, one of the opinions I recall was that he was functionally retarded. I believe also there was evidence to suggest that there was likely what I would refer to as neurocognitive impairment, which is support of equivalent to possible brain damage. I certainly testified to other issues that is not necessarily related to the retardation issue in terms of his abusive family and dysfunctional family and so forth.

Q Are speech impediments an example of adaptive [125] functioning deficits?

A Sure.

Q Would limited social skill and impaired self-concept also be examples of deficits in adaptive functioning?

A Yes.

Q Now, you testified with regards to Mr. Hall and did you—do you recall any mental illness being involved in this case?

A There certainly was suggestions of mental illness. And, I believe, I diagnosed him as having a schizotypal personality disorder. By that, I meant that depending on, in certain circumstances, in terms of stress, that he could become psychotic. At the time that I evaluated him, I did not feel that his suspiciousness or unusual thoughts—he had some unusual thoughts regarding rooting (phonetic) and some other religious ideations, but I did not feel that he was psychotic at the time that I evaluated him.

Q Dr. Krop, can a person be mentally ill and also mentally retarded?

A Sure.

Q Having reviewed all of the testing and history in Mr. Hall's case, are the test scores obtained by the various mental health professionals consistent with your [126] findings?

A I think all of the scores, with the exception of one that was done by a student, Marilyn Feldman—all of the test scores that I have reviewed have fallen within the range of mental retardation in terms of a clinical assessment.

MS. RODRIGUEZ: Thank you, Dr. Krop. I have no further questions.

MR. TATTI: May it please the Court?

THE COURT: Yes.

CROSS-EXAMINATION

BY MR. TATTI:

Q Dr. Krop, I may have misspoke. You did not testify in the resentencing proceeding in 1991, did you?

A I don't believe so. I believe I testified at an evidentiary.

Q In a 3.850 proceeding that occurred in 1997?

A That's correct.

Q And you were asked questions about the evaluation you did prior to the resentencing proceeding—

A Yes.

Q —in the early '90s?

A Correct.

Q Okay. But you did not appear and testify in [127] the resentencing?

A Correct.

Q And just so we're also clear, the full-scale I.Q. that you obtained as a result of your testing of Freddie Lee Hall in March and September of 1999—I don't know which of those two dates you gave him the test. Do your records reflect when the test was administered?

A I don't think they do. And I don't have my original notes. I am presuming that I would have administered the I.Q. test the first time I saw him.

Q So that would have been in March of 1990?

A Yes.

Q And the results of that testing, using a Wechsler Adult Intelligence Scale-Revised, the revised version of the test was a full-scale I.Q. of 73; is that correct?

A Yes, sir.

Q And the test that you refer to that you had—or report that you had been provided from the student was a student by the name of Marilyn Feldman; is that right?

A Yes, sir.

Q And she administered the same Wechsler test, did she not, according to her report?

[128]

A Yes, four years earlier.

Q A WAIS-R?

A Correct.

Q Which, at that time, would have been, for lack of a better word, the state-of-the-art in terms of Wechsler's intelligence tests?

A Most likely, yes.

Q And she obtained a score of 80, full-scale I.Q.; is that correct?

A That's correct.

Q Now, the general questions Ms. Rodriguez asked you with regard to the diagnosis of mental retardation and treatment and clinical perception of the idea of mental retardation, you are aware, are now different than what the Florida Supreme Court says is relevant to Florida law with regard to the death penalty; is that correct?

A I'm familiar with that, yes.

Q You understand that the Florida Supreme Court has very clearly announced that in order to be considered mentally retarded under Florida law for the purposes of the death penalty, administering the death penalty, that an I.Q. has to be at 70 or below?

A I am familiar with that, yes.

MR. TATTI: I don't have any other questions.

[129]

MR. NUNNELLEY: Wait, wait.

MR. TATTI: Excuse me, your Honor.

MR. NUNNELLEY: Give us just a minute, Judge?

THE COURT: Sure.

MR. TATTI: I don't have any other questions, your Honor.

THE COURT: Okay. Redirect?

MS. RODRIGUEZ: A moment, your Honor?

THE COURT: Okay.

MS. RODRIGUEZ: I have nothing further, your Honor.

THE COURT: Nobody has anything further for Dr. Krop?

MR. TATTI: No, sir.

THE COURT: May Dr. Krop be excused and released from his subpoena?

MS. RODRIGUEZ: Yes, your Honor.

MR. TATTI: Yes, sir.

THE COURT: Thank you for coming in, Dr. Krop. You are free to go about your business. If you are under subpoena, you are released from that subpoena.

THE WITNESS: Thank you.

MS. RODRIGUEZ: Your Honor, we have no further witnesses today.

[180]

THE COURT: Okay. Let's talk again about what you have coming in—who you have coming in tomorrow and when they are scheduled to arrive. And please check back with them, because we need to get going right at nine o'clock tomorrow.

MS. RODRIGUEZ: Dr. Prichard, your Honor, should be here first thing in the morning. And we let him know what time we're starting. We expect to see him tonight. He'll be here overnight so we should be on time tomorrow.

THE COURT: Nine o'clock tomorrow.

MS. RODRIGUEZ: That is our final witness.

THE COURT: And then the state can decide whether they wish to call any witnesses.

MR. NUNNELLEY: If we do, they will be here timely, your Honor.

THE COURT: How long do you think Dr. Prichard would be on the stand—how long would your part take?

MS. RODRIGUEZ: I would say an hour, your Honor.

THE COURT: So it's up to the state what they wish to do. But you expect to be able to rest including

Cross-Examination, let's say, after—say two hours tomorrow?

[131]

MS. RODRIGUEZ: Oh, yes, your Honor.

THE COURT: All right. Okay.

MR. NUNNELLEY: Judge, the only comment I have—you know, I'm not sure—you know, if Dr. Prichard testifies consistently with his report, which he best or he's going to have some problems for certain, that's going—that testimony will be that Mr. Hall has a full-scale I.Q. of 72, I believe it is—71.

THE COURT: Three is what was—oh, okay in that report.

MR. NUNNELLEY: Krop had a 71.

THE COURT: 73 for Dr. Krop.

MR. NUNNELLEY: 73, 71.

THE COURT: Over 70.

MR. NUNNELLEY: Over 70. I'm a little confused of what the benefit of a live witness is going to be in this circumstance. I mean, it's not going to get any better for them, I don't see. And I don't know why we can't—I don't know what we're supposed to do. It makes no sense the way we are. The evidence on its face shows that the defendant does not meet criteria for mental retardation under *Cherry* and the applicable statutes.

[132]

MS. RODRIGUEZ: I will only state on the record that Dr. Mosman testified—

MR. NUNNELLEY: We're going to object to that, your Honor. Dr. Mosman is dead and not subject to Cross-Examination.

MS. RODRIGUEZ: Your Honor, I would like to have an opportunity to address the Court without the interruptions, if I might. Dr. Mosman's records were reviewed by Dr. Prichard. So when Dr. Prichard testifies, he has to testify with regard to all of the reports that he reviewed in rendering an opinion. That is our last witness that we intend to call tomorrow. We should have an opportunity to call Dr. Prichard, since the motion itself was filed with Dr. Prichard's report, and that's the basis for being before the Court.

So I think the Court has already ruled on the motion from the state. And I think the state is trying to further limit the defense's ability to put on the evidence. I don't think that there was a question with regard to Dr. Prichard testifying in this case.

THE COURT: Well, I mean you have not rested; you can call whichever witness you want. The state knows the rules, and they are fully capable of [133] objecting if they think it's—

MS. RODRIGUEZ: I would agree, your Honor. But this argument I would say is premature.

THE COURT: It's clearly premature, although I understand where they are coming from. They are trying to put everybody on notice of what they anticipate. That's appreciated, and we'll deal with it when it comes up.

MS. RODRIGUEZ: We're not sure ourselves with regard to Dr. McClaren and whether or not we should prepare this evening for the Cross-Examination of Dr. McClaren coming in tomorrow.

THE COURT: If you wish to ask them a question, either on the record or off the record, that's fine. And it's up to them whether or not they wish to answer. I'm sure if they do answer, they will tell the truth, but otherwise—and if you want it now, that's fine. If you don't, you can ask them—

MS. RODRIGUEZ: Well, they certainly have the prerogative to call the witness, your Honor—

THE COURT: Of course.

MS. RODRIGUEZ: So I would not ask the question.

THE COURT: Is there anything else either side [134] wants to bring to the Court's attention before we recess for today?

MR. TATTI: No.

MS. RODRIGUEZ: Nothing from the defense, sir.

THE COURT: All right then. We'll recess for today, resume tomorrow morning at 9 a.m. sharp.

Court is in recess until tomorrow morning at 9 a.m.

(Whereupon, court was adjourned until 12/8/2009 at 9 a.m.)

* * *

[138]

Thereupon, the following proceedings were had and taken in regard to the above-styled case out of the presence of the defendant:)

THE COURT: Good morning.

MR. TATTI: Good morning, Judge.

MS. RODRIGUEZ: Good morning, your Honor.

THE COURT: Are there any matters that either side wishes to take up with the Court before we call our next witness?

MR. TATTI: Yes, sir.

MS. RODRIGUEZ: Yes, your Honor.

MR. TATTI: I will let her go first.

THE COURT: Ladies first.

MS. RODRIGUEZ: Very briefly. Yesterday, we represented to the Court that we would be filing a document on the judicial notice that specifically would list for the Court the parts of the record that would be reviewed. We have shown this to the state. We do have copies for the state of all the documents that we're referring to in this motion before the Court and we'll be providing them to the state. And we have filed this with the Court.

THE COURT: You also have copies for the Court?

MS. RODRIGUEZ: Yes, your Honor.

[139]

THE COURT: Because, like I said, I don't even have the file.

MS. RODRIGUEZ: We do, your Honor. I apologize to the Court. I'm out of breath this morning. It comes with old age.

MR. TATTI: Judge, I don't have a problem at this point with her filing the motion. But I would ask an opportunity to re-address it later when I have an actual opportunity to look at the documents themselves. Because looking at the record citations, I don't have a recollection such that I can tell what part of the resentencing they relate to.

THE COURT: You can't tell? You don't know what's on each page of that?

MR. TATTI: No. There may have been a time in my life that I could do that, but I'm well past that time now.

THE COURT: I don't see that as a problem. I'm not sure yet where this thing is going to go and where it's going to end up. But I don't see a problem either way at this point.

(Defendant's Exhibit G identified for purposes of the record.)

MS. RODRIGUEZ: Your Honor, a second item that [140] I did show the state is we prepared an exhibit for the clerk to mark with regards to the documents that were reviewed by Dr. Prichard in preparation for his testimony today. We felt, because of the voluminous records, it would be to the witness and the Court's advantage to have those pulled, as well. We've listed it as a proposed Exhibit 7 on our list, and I'm asking the clerk to mark this so that we can have all of the documents that Dr. Prichard reviewed in one place.

THE COURT: Any problem?

MR. TATTI: I don't have an objection to it being marked at this point.

THE COURT: Sure.

MR. TATTI: But in terms of at the point that it is offered into evidence in this proceeding, I have a specific objection to at least one of the documents in there. And that would be the report dated November 19th, 2001, from an individual by the name of Bill Mosman, a

psychologist who apparently evaluated the defendant in 2001.

My objection is this, your Honor: Apparently, Dr. Mosman evaluated Mr. Hall outside of any pending litigation. In 2001, this matter was not before the Court on the defendant's motion under [141] the rule or under the new statute. In fact, I'm not—the rule didn't exist, I know. I'm not sure the statute did. In 2001, I'm not sure exactly what the status of *Adkins* was in 2001. But it's outside of any litigation relating to Freddie Lee Hall.

MS. RODRIGUEZ: Your Honor—

MR. TATTI: Dr. Mc—

MS. RODRIGUEZ: I'm sorry, I thought you had concluded.

MR. TATTI: No, not even close.

MS. RODRIGUEZ: I thought you were raising the objection at the time that we offered the materials.

MR. TATTI: I want the ruling now, because it relates to Dr. Prichard's testimony, as well.

Your Honor, Dr. Mosman has never appeared in court, to my knowledge, to testify regarding Freddie Lee Hall and his evaluation of Freddie Lee Hall and, thus, he has never been subject to Cross-Examination.

Prior to this proceeding, I was provided a copy of a report, apparently authored by Dr. Mosman, dated November 19th, 2001. However, I received no raw data, no test instruments. I [142] didn't get—I didn't get any of Dr. Mosman's notes. I have no background material in support of Dr. Mosman's report. Dr. Mosman is dead. Dr. Mosman is not available for me to depose, much less cross-examine at this juncture. It would be

patently unfair through the exception that would allow Dr. Prichard to testify based on another expert's work, to rely on an opinion of this nature, given the fact that the state has absolutely no opportunity to address or rebut it, much less a fair opportunity to address or rebut it.

And, therefore, I would interpose an objection to the Court's consideration of Dr. Mosman's report. It is hearsay in its rankest form. And I submit that despite the fact that the rules of evidence would ordinarily allow Dr. Prichard to testify about another expert's report, I submit under 403, the danger of prejudice here far exceeds any probative value in having Dr. Prichard repeat what he read from Dr. Mosman's report, given my inability to address it at all at this point.

MS. RODRIGUEZ: Your Honor, Dr. Mosman's report was made known to the state quite some time ago.

[143]

THE COURT: Well, what—

MS. RODRIGUEZ: In 2003, your Honor, the report was authored by Dr. Prichard. Dr. Prichard at that time relied upon and talked about, in of his report of 2003, the fact that Dr. Mosman had concluded and done an evaluation giving a full-scale I.Q. of 69 to Mr. Hall. That was never secret and always part of the litigation. The state never took the opportunity to depose either Dr. Prichard or to seek to talk to Dr. Mosman. Not anticipating, quite frankly, this objection, I don't have the date of death as far as Dr. Mosman is concerned. But I would suggest to the Court that there

may have been an opportunity at that time for the state to speak with Dr. Mosman himself.

As far as the raw data and raw materials and any of that information, that has never been requested by the state. I'm not even certain that we have any of that material, because it goes expert to expert. And it may be in the possession of Dr. Prichard, but not anticipating this objection today, your Honor, I wasn't able to consult with Dr. Prichard to see what he does or does not have with regards to Dr. Mosman.

[144]

That being the case, Dr. Mosman was a licensed clinical psychologist in the state of Florida and also a lawyer, licensed by the Florida Bar. He did not give a legal opinion, however, Dr. Prichard is certainly entitled to rely upon the report and evidence in the record in terms of what he did and what he reviewed in making his own diagnosis in this case. And that would be my response to the state with regards to this objection.

MR. TATTI: Just briefly. I did specifically request all raw data that would have been provided to Dr. Prichard in a motion to compel that, I believe, was filed in 2005. And as a result of that motion, I received a great deal of information. But I did not receive any raw data that appeared to relate to Dr. Mosman's report. That was Court ordered, that I was entitled to that material. And I didn't get it.

MS. RODRIGUEZ: With all due respect, your Honor, I was not the counsel of record at the time, but I would represent to the Court, again, that Dr. Prichard's report is dated February 4, 2003. On that report, specifically inside this report, there is reference to the various experts that he relied upon: Dr. Krop, at page 12,

your Honor; [145] midway, Dr. Bill E. Mosman conducted an evaluation of Mr. Hall and the date listed is November 19, 2001. And it goes into a description of all of the tests that were performed and the opinion that he obtained, including the fact that he is mentally retarded and full-scale I.Q. score.

As far as the state not being on notice, I would object to that representation today before the Court—or having had an opportunity to address this issue before February 4th, 2003.

MR. TATTI: Your Honor, I never indicated I wasn't on notice. I'm entitled to wait to see what it is she's going to present. She handed me the documents that she just had marked that were the materials she said Dr. Prichard reviewed. There is no raw data in that material either. I obviously wouldn't be in the same position to make this complaint if such documents existed and I had an opportunity to review them. I might be in a position, if I had that, to ask for a delay of some minor—so that my expert could look at that material. But the fact of the matter at this point, on December 8th, 2009, I have absolutely no means to rebut or address the hearsay testimony regarding Dr. Mosman's report. And there is no [146] other source for that information. And that is the basis for my objection. I did everything I could to get the information that Dr. Prichard relied on for Dr. Mosman. Dr. Mosman's name was never on the defendant's witness list; it's always been Dr. Prichard.

So I assume the conduit for Dr. Mosman's report would be Dr. Prichard. So today, I discover that there is no more than what I received, which is a typewritten report. And your Honor, that's simply unfair to—to

allow Dr. Prichard to testify about a report from a clinician who is deceased and cannot be cross-examined.

MS. RODRIGUEZ: Clinicians die all the time, your Honor. And experts are allowed to rely on that particular evidence—I'm sorry, your Honor, I can't concentrate.

THE COURT: Just wait.

MR. NUNNELLEY: We're entitled to converse, your Honor.

THE COURT: Apparently, it was loud.

MR. TATTI: Sorry.

THE COURT: Go ahead.

MS. RODRIGUEZ: Clinicians are permitted, your Honor, to rely upon the expert opinion of other [147] clinicians. In this particular case, the state never requested when this Court appointed an expert, and the expert looked over all of these materials, including the report submitted by Dr. Prichard—there was no request for any raw data.

Dr. McClaren did not test Mr. Hall, to my knowledge. The state's not planning to call this expert, or at least made that representation before the Court yesterday, so it's difficult for me to understand the prejudice and the unfair advantage, if you will, that the defense has taken in this particular case because they don't have the raw material. The raw material would not go to the attorney. It would go directly to their expert. It's expert to expert, is what we've heard and what we've been told by our experts. And Dr. Prichard would have shared that information directly with Dr. McClaren.

As I stand here now, I do not know, your Honor, whether that was done or not done, whether Dr. McClaren picked up the phone and called for it, because usually that's what happens, and they will exchange information. It doesn't go through the lawyer, not the raw material data. That's how it's [148] worked since I've been at CCRC. So I cannot answer that question.

But I can state to the Court that the state's not prejudiced. Certainly Dr. Prichard should be permitted to testify. And the defense would not be opposed if they wish to call McClaren at another point in time and look over the materials, to have him come and testify.

MR. TATTI: Your Honor, January 12th, 2005, your Honor presided over a case management conference on this case. As a result of that case management conference, an order was issued by your Honor dated February the 1st, 2005. During that case management conference, I moved ore tenus to appoint Dr. McClaren to assist the state, and advised the Court at that time that I had no expectation at that point that Dr. McClaren was going to evaluate Mr. Hall. Simply, I wanted him appointed to assist me.

I also moved at that time to compel the defendant to produce all of the raw data attendant to Dr. Prichard's report, as well as any raw data that came with the reports that were given to Dr. Prichard. As a result of my motion, the Court entered an order. Beginning at Paragraph 2, the [149] order says, The state's motion to compel and motion for appointment of expert witness—

THE COURT: What's the date of this order?

MR. TATTI: February 1st, 2005—is granted, paragraph (a): The defendant is hereby directed to provide the following documents and materials to the state with-

in 30 days, on or before Friday, February 11th, 2005: One, copies of any and all raw data and notes associated with the psychological evaluation, slash, assessment of the defendant by Dr. Gregory Prichard, including any and all psychological tests and answer sheets.

Two, copies of any and all written or recorded material provided by the defendant to Dr. Prichard or independently obtained by or on behalf of Dr. Prichard.

And three, copies of any and all psychological or psychiatric reports provided to Dr. Prichard including testing material, raw data, and notes associated with the said reports.

The suggestion that I didn't ask for this is erroneous, your Honor. I not only asked, your Honor ordered it in 2005.

MS. RODRIGUEZ: Your Honor, I'm not disputing the fact that they are entitled to the material. [150] I'm not disputing that at all. I'm suggesting to the Court that there was a different counsel in the case. He would have picked up the phone and called Dr. Mosman and had Dr. Mosman send it directly to Dr. McClaren, because it does not come through the attorneys. The only way I would know that it had not been received is if the state or the state's expert made contact and said, We don't have this, then I could have responded to the Court. Because as I stand here today, this is the first I'm aware that they don't have this particular material in the records.

And it was made as a response to my trying to get the records together so they would have everything to review and prepare for closing arguments. I'm not disputing that they are entitled to it or that the Court signed an order or any of that. I'm just suggesting to

the Court that only Dr. McClaren could certainly tell us whether he got it or didn't get it and it was nothing purposeful on our part. I don't understand the relevance to the objection, because the witness is not being called and, you know, what's the prejudice at this point?

So I believe that, you know, it's somewhat [151] premature. They are on knowledge [sic] with regard to what he's going to testify to in terms of the materials. And if they were going to challenge that, then certainly they would have planned to do that through their expert. So I can't understand what the problem is here. If, by some chance, Dr. Mosman's death occurred—and I don't know that to be the case—and the materials did not reach Dr. McClaren, you know, for some reason, Dr. Prichard may have a copy of these materials. I don't know the answer to that. I have not had an opportunity, your Honor, to ask Dr. Prichard if he has those materials that they are requesting at this time.

And I do apologize to the Court, because this is the first I've become aware of this problem. Certainly, Dr. Prichard could make these materials available to the state so they could provide them to their expert. I don't have any objection to that. But at this time, to come in and try to strike this testimony when they have been on notice, based on this report, what it entailed and what it contained, I—you know, I find that just incredible, your Honor. And I would ask the Court not to allow the state to limit the defense in this [152] way from presenting this testimony.

MR. TATTI: First of all, your Honor, I'm not aware of any rule of procedure or any practice that says raw material doesn't come to me, it goes directly to my expert. The Court's order said it was to come to me.

Every other piece of raw data came to me and then I gave it to my expert.

My expert is not in a position to make a hearsay objection, which is what I'm doing at the point the evidence is being or about to be offered, which is perfectly timely and perfectly appropriate.

The suggestion that there is no prejudice is ridiculous, because the—the report suggests an I.Q. score, which is what we're all here about. And it's an I.Q. score which I have no ability at all to challenge or question or test. It's never been testified to in a courtroom relating to Freddie Hall.

Now, there are I.Q. scores back from 1976. And all that has been the subject of testimony in the ongoing litigation that is the State of Florida versus Freddie Lee Hall. I'm not arguing about those. Those have come in. I didn't object to those in the past, as far as back as 1991. But [153] this one is completely new, has never been presented in court, and on the eve, or the few moments before it's about to be, I have a right to be heard on a legitimate objection to its admissibility.

I don't think I can more clearly state the fact: The man is dead. There is no way for me to challenge this. The base rules of evidence and frankly everything in the evidence code evolves out of the hearsay rule. This is the rankest form of hearsay, and it should not be permitted. And I would ask the Court to exclude it.

MS. RODRIGUEZ: The rules of hearsay, as this Court well knows, in post-conviction matters is relaxed. I'm not asking the Court to ignore the rules of evidence with regard to this proceeding. I'm suggesting to the Court that the expert rendered an opinion and proceeded in this case based on the data that was before

him and the test scores that were submitted to him, which included Dr. Mosman. Had the defense left that out of the picture, the defense would not have been presenting a thorough case and all of the information that this expert relied upon in reaching a conclusion that Mr. Hall was mentally retarded. There is just [154] no way around it.

Dr. Mosman's test score definitely had an effect on Dr. Prichard. Dr. Prichard has had other cases where he has only done I.Q. testing and he has done nothing with regards to adaptive functioning. The reason that Dr. Prichard went forward, of course—and, again, I can't speak for Dr. Prichard—is because there was a 69 before him. So, obviously, it had a bearing on how he proceeded in this case, your Honor. He did go further. He did not just go with intelligence testing, but he did a full adaptive functioning evaluation on this client. So it had, definitely, a bearing in how Dr. Prichard approached this case. There is no way that Dr. Prichard can testify without talking about and his reliance on these test scores.

Now, the state can certainly impeach him and ask him questions about this and can see if he has the raw materials to provide to their expert. But the time to have had that done was through the discovery process and through depositions. I would suggest to the Court that this is not the appropriate time for this to having been coming up for the first time. This has been an issue, [155] apparently, if the state went over this report from Dr. Prichard, it should have been an issue when they received Dr. Prichard's report in 2003, not today. If something was missing from the materials that was critical to the state, the state never picked up the phone to call and ask for it. Or the expert never called and said they needed something further in order to fully

evaluate and work on this case. So that's where we are, your Honor.

THE COURT: Anything else, Mr. Tatti?

MR. TATTI: No, sir.

THE COURT: Either side have any case law or any legal authority that they want to provide the Court?

MR. TATTI: Judge, I can pull cases that talk about the fact that, while the rules of evidence, particularly the hearsay rule, are somewhat relaxed in a sentencing proceeding, and in many regards in a post-conviction proceeding, the overriding rule is hearsay is admissible, provided the opposing party has a fair opportunity to rebut. And the cases are legend in which trial courts have excluded rank hearsay in which the opposite side has no opportunity—no fair opportunity to rebut it. So I'm relying on a basic premise of evidence [156] here.

THE COURT: If Dr. Prichard has some material that you are looking for, would that in some way, through delay or whatever, cure the prejudice you are claiming?

MR. TATTI: It would certainly improve my situation. I cannot tell the Court it would resolve it. But I suspect that Dr. Prichard doesn't have that. Because, clearly, counsel was ordered in 2005 to give it to me if they had it, and I have never received it. And it is not in the packet that she has marked for identification as the material that was provided to Dr. Prichard.

MR. NUNNELLEY: Your Honor, may I be heard?

THE COURT: Sure.

MR. NUNNELLEY: I think perhaps one thing we need to do, first of all, Dr. Prichard is sitting right here. We can ask him.

THE COURT: I know that. I'm getting there.

MR. NUNNELLEY: Let's find out if he's got it, first of all.

THE COURT: That's where I was going.

MR. NUNNELLEY: If he has it, the problem we have is basically it's a Richardson violation, coupled up with a violation of a direct court order [157] if it hasn't been provided. But the point is we don't have any way—the problem is, without the raw data, we can't inquire—the simple—just for example, we can't ask Dr. Prichard if Dr. Mosman scored the intelligence testing correctly. If he doesn't have the raw data and we don't have the raw data, we don't know. We have got to make the assumption that I think is a dangerous one, and an inappropriate one, that Dr. Mosman correctly scored it. We find score errors in the intelligence testing quite frequently. That's just an example of the problem that we're running into.

And I think what we need to know right now is whether or not Dr. Prichard has it. If he's got it, and they can give it to us and we'll deal with that down the road. If he doesn't have it—

THE COURT: All right.

MR. NUNNELLEY: —then we have got a whole different set of problems. But the one thing I would cite the Court to would be one of the *Lightbourne* decisions. I apologize, I can't remember which one, I've done so many. But the rules of evidence are not suspended in this proceeding simply because it's post-conviction. [158] Simply because we're talking about

sentencing, the rules of evidence, as they apply in the penalty phase, do not apply here. The rules are the rules. Those rules of evidence apply here, just like they do at any other trial.

THE COURT: All right. This is the way I think I'm going to handle it at this time. I'm going to note your objection and grant a continuing objection. We're going to call Dr. Prichard up. One of the very first questions, and we can do it either as a voir dire or whatever, is find out what he has in the way of the materials you are asking about. You know, ask some questions related to that and see where that gets us.

Then I will rule on that issue. I will tell the defense regardless of how I rule, I will allow you to proffer a proffer of the material.

MS. RODRIGUEZ: I understand, your Honor.

THE COURT: In case there is—

MS. RODRIGUEZ: I understand.

THE COURT: —this ruling is an error in some way.

MS. RODRIGUEZ: I would suggest that we call Dr. Prichard up just for that purpose and allow the state—

[159]

THE COURT: He's going to come up anyway. Bring him up, put him under oath.

THE CLERK: Your Honor, I'm sorry, she never did hand me that packet for me to label it.

MS. RODRIGUEZ: I apologize.

THE CLERK: That's okay. You were busy.

MR. NUNNELLEY: Judge, for the record the *Lightbourne* citation 644 So.2d 54 from 1994.

THE COURT: That's the one that talks about the rules of evidence are not suspended?

MR. NUNNELLEY: Yes, sir, that's *Lightbourne*, before he was my case.

MS. RODRIGUEZ: Your Honor, I know that there are a series of cases with regard to expert-to-expert testimony. I would like to supplement the record with those cases as soon. As I can get back to my office, I would be more than happy to provide the Court with a list of the cases that allow an expert psychologist to testify regarding consultations with other expert psychologists and the extent of that testimony.

THE COURT: I think—I know that's allowed, but only after the material that underlies that opinion has been discovered.

MS. RODRIGUEZ: Yes, your Honor.

[160]

THE COURT: All right. Okay. Dr. Prichard.

GREG PRICHARD, Ph.D.,

the witness herein, being first duly sworn, was examined and testified as follows:

THE WITNESS: I do.

MS. RODRIGUEZ: Your Honor, I will pass the witness to the state so they can voir dire him on this issue.

THE COURT: Fair enough. We need to establish his name at least and—

MR. TATTI: I'm very capable of doing that.

THE COURT: I know you are. I'm just saying that hasn't been done yet. We need to get that in the record.

VOIR DIRE EXAMINATION

BY MR. TATTI:

Q Would you state your name, please?

A Greg Prichard. Last name is P-R-I-C-H-A-R-D.

Q Dr. Prichard, were you consulted or approached by CCRC to evaluate an individual by the name of Freddie Lee Hall?

A Yes.

Q When were you first approached?

A It was in 2002. I don't remember the month.

Q All right. As a result of your retention by [161] CCRC, did you, in fact, evaluate Freddie Lee Hall?

A Yes, I did.

Q Prior to your evaluation, or subsequent to your actual meeting with Mr. Hall, did you receive materials from CCRC relating to Mr. Hall's background and history?

A Yes.

Q Among the materials you received, was there a report from a Dr. Bill Mosman?

A Yes.

Q Did you receive any additional material that appeared to relate to Dr. Mosman's report?

A No.

Q So you have never seen the actual testing instrument, any raw data or notes associated with Dr. Mosman's report; is that correct?

A That's correct.

MR. TATTI: I don't have any other questions.

THE COURT: Cross-Examination within the voir dire?

MS. RODRIGUEZ: Yes, your Honor.

VOIR DIRE EXAMINATION

BY MS. RODRIGUEZ:

Q Dr. Prichard, did you contact Mr. Mosman at any time after receiving that report?

[162]

A No.

Q Have any discussions with him at all?

A No.

MS. RODRIGUEZ: I have nothing further, your Honor.

THE COURT: All right. Counsel, anything further by way of argument?

MR. TATTI: No, sir.

THE COURT: All right. Then I'm going to sustain the objection of the state as to the testimony through conduit of Dr. Mosman for the reason that violation of—I'm not finding an intentional violation, but an inadvertent violation of the previous discovery order referenced February 1st of what year?

MR. TATTI: 2005.

THE COURT: 2005. The raw material that would relate to the testing by Dr. Mosman was not supplied. Therefore, the state is at great prejudice, unable to cross-examine, unable to challenge it through their own retained expert or otherwise. And therefore, it would be very unfair, grossly unfair, prejudicial to allow this in.

However, that being said, and that being the ruling of the Court, you may proffer it so that [163] there is some record of where you are coming from on this issue. And otherwise, you may proceed then with your Direct Examination of Dr. Prichard.

DIRECT EXAMINATION

BY MS. RODRIGUEZ:

Q Good morning, Dr. Prichard.

A Good morning.

Q Dr. Prichard, what is your occupation?

A I'm a licensed clinical psychologist in the state of Florida.

Q Can you state your credentials for me?

A I did my undergraduate work at University of Florida. I graduated there with honors in 1989.

MR. TATTI: Excuse me, Doctor. Your Honor, the state's prepared to stipulate that Dr. Prichard is more than qualified as an expert in the field of clinical psychology.

MS. RODRIGUEZ: We appreciate that, your Honor. If I could just go a few questions further to get the credentials on record?

THE COURT: Go ahead.

BY MR. DEFS:

Q Can you talk about any internships or residences that you have had?

A I graduated from my graduate school in 1994. [164] I did an internship at Florida State Hospital in Chattahoochee. I initially was a senior psychologist on a dual diagnosis unit, a unit for individuals who were developmentally delayed or mentally retarded and/or mentally ill. I worked at the hospital after my internship for about seven years, and I had one day of a week of private practice doing competency assessments, sanity assessments, other court-appointed work.

I began doing assessments for the Agency for Persons with Disabilities in the Tallahassee area in '96 to assess whether or not a person is mentally retarded or not. And I have been doing those evaluations continually since then. I've been in full-time private practice as a clinical and forensic psychologist since 2001. And 99 percent of what I do is forensic-related competency assessments, sanity assessments, sex offender risk assessments, mental retardation assessments.

Q You are a member of different professional organizations as well, which are those?

A American Psychological Association, Florida Psychological Association. American Association of Mental Retardation, now called American Association of Developmental Disabilities and Intellectual Limitations, or something like that.

Q Can you approximate for me how many mentally [165] retarded individuals you have evaluated?

A Yeah, I can approximate probably 1500, 2,000, maybe more, I'm not sure.

Q Approximately how many times have you administered Vineland as an adaptive test?

A At least 1,000 times.

Q And, obviously, you have been qualified many times as an expert in the mental retardation area in courts in Florida?

A Yes, ma'am.

Q I asked you to prepare a list of some of the cases you have been involved in, in terms of mental retardation cases.

A Yes, ma'am.

Q Were you able to do that?

A No. My office got the message after I had left town, so I didn't get the message until late yesterday.

Q You have been involved in a number of the mental retardation cases, specifically, in the state of Florida?

A Correct.

Q And in those cases have you appeared for both the defense and the state?

A Yes.

[166]

Q Were you the psychologist who testified in the case of *Cherry*?

A Yes. One of the psychologists that testified in that case.

Q In that capacity, were you employed by the state?

A I was initially hired by the state to assess Mr. Cherry, yes.

Q In that case, did you testify that he was not mentally retarded?

A In that case, I testified I believe that Mr. Cherry was mentally retarded.

Q And who retained you in this case?

A Your office did, Capital Collateral Regional Counsel, Middle Region.

Q Do you recall the attorney on the case at the time?

A Mr. Eric Pinkard.

Q And was it Mr. Pinkard that provided you with a package from our office with materials?

A Yes.

Q And in response to those materials that were presented to you, were you requested also to provide a CV to our office?

A Um.

[167]

Q Or at some time later?

A At some point, yes.

Q You were asked to provide a CV for our office?

A Yes.

MS. RODRIGUEZ: Your Honor, if the record might reflect I'm showing the witness both the CV and the exhibit with regards to the documents that were provided to him. (Tendering to the state first.)

(Defendant's Exhibit A identified for purposes of the record.)

BY MS. RODRIGUEZ:

Q I will show you first your CV and ask if that's a fair and accurate representation of your credentials.

A Yes.

Q And ask you next, as to what's been marked as Exhibit F for identification, is that a fair and accurate representation of the materials that were provided to you for review by Mr. Eric Pinkard?

A Looking at the index, if that's what is contained in this packet, yes.

MS. RODRIGUEZ: Your Honor, for the record, the CV is Defendant's Exhibit A.

THE COURT: Are you offering that?

[168]

MS. RODRIGUEZ: Your Honor, I was going to actually ask him the list from the index and then attempt to make the offer. I understand there is an objection as to the—one of the items that's on the index and we can take up that issue.

THE COURT: I was asking about the CV.

MS. RODRIGUEZ: Yes, I was going to offer both, your Honor. Let me begin with the CV first, yes.

At this time I'd like to offer in Dr. Prichard's CV into the record. I believe the state may not have an objection since they offered to stipulate to his credentials early on, but ...

MR. TATTI: No. There is a completely different basis. I object to the CV. It is hearsay. The doctor is perfectly willing, able, and I'm sure could more than accomplish what's on the CV by testifying. But the

CV, itself, is hearsay, and I do object. I understand the Court's admitted it but—

THE COURT: Well, I am going to admit it. I think it's preliminary and I—

MS. RODRIGUEZ: I think the doctor's reviewed—

THE COURT: I need to do future search to see [169] what the law behind that is. But I have always allowed them, and it's preliminary and I don't quite understand the objection. Anyway, I'm going to overrule it, allow it into evidence.

What number will it receive?

THE CLERK: It will be Number 3.

THE COURT: Number 3.

(Defendant's Exhibit 3 received in evidence.)

BY MS. RODRIGUEZ:

Q Dr. Prichard, I'm going to hand you the exhibit list, the index to this exhibit.

A Yes, ma'am.

Q And I'm going to ask you if you could, please tell us what's listed on the index with regard to the specific items that were provided to you by CCRC.

A There was a report by Dr. Dorothy Otnow Lewis. Otnow is O-T-N-O-W. A report by Dr. Leslie Prichep, P-R-I-C-H-E-P; Barbara Bard, B-A-R-D; a report by Dr. Harry Krop; a report by Mrs. Marilyn Feldman; Dr. George Barnard, a report by him, a report by him; Dr. Jonathan Pincus, P-I-N-C-U-S; report by Dr. Carrera, C-A-R-R-E-R-A; a report by Dr. Kathleen Heide, H-E-I-D-E; report by Dr. Jethro Toomer,

T-O-O-M-E-R; a report by Dr. Bill Mosman, M-O-S-M-A-N. Some Department of Corrections records from 1968/1969, when he was in [170] the Department of Corrections, and also from 1978 on. Transcripts of testimony by Dr. Barnard. Transcripts of testimony by Mr. Hall's sister Deana Mitchell-Rigsby; a transcript of testimony by another of Mr. Hall's sisters, Katie Mae Glenn, G-L-E-N-N. Transcript of testimony by one of his brothers, Mr. James Hall. Finding of fact for sentencing that was prepared by the Honorable Richard Tombrink, Jr., and some educational records.

Q Now, Doctor, obviously, you are familiar with the definition for mental retardation—

A Yes.

Q —that's in the rule?

A Yes, ma'am.

Q And could you share that definition with us?

A Mental retardation is basically a three-prong determination. The first prong is significantly subaverage intellectual functioning, which is defined as two standard deviations below the mean on an approved intellectual measure. Mean is 100 standard, deviation is 15, so below that is considered significantly subaverage or mentally retarded in terms of intellect.

Second prong is commensurate deficits in adaptive skills. Essentially, that means that a person's personal and social self-sufficiency, they are [171] unable to independently function in society because of their cognitive limitations. And that's measured by adaptive instruments, generally, the Vineland Adaptive Behavior Scales. So that's also represented by two standard deviations below the mean of 100. So the standard of de-

viation is 15, so below 70 is two standard deviations below the mean for adaptive deficits.

And the third prong is manifestation—exhibit mental retardation is a developmental disability. So manifestation must be in the developmental years between years of age of birth and the age of 18.

Q Is the third prong, the developmental stage, is that discretionary?

A No.

Q Does that have to appear?

A It must appear because mental retardation is a developmental disability, as opposed to, for example, a head injury in adulthood. Even if a person has cognitive limitations after the head injury in adulthood, it's not a mentally retarded person because mental retardation is a developmental disability that occurs when the child is developing.

Q Have you ever evaluated a person and found a person with an I.Q. below 70 that's not mentally [172] retarded?

A Yes.

Q Discuss that with me, Doctor.

A Okay. The—it is literally a three-prong process, when somebody has intellectual limitations that are significantly subaverage, meaning right at or around two standard deviations below the mean of 100 or right around 70—

MR. TATTI: Judge, at this point, I'm going to interpose an objection. I have not interposed so far in this proceeding, but Dr. Prichard is reciting a clinician's approach to mental retardation, which I submit is not

relevant to this proceeding. Because under the law, if an I.Q. is above 70, a person is not mentally retarded, regardless of the other two prongs of the test.

So to have him recite the conditions under which someone could be under 70 and not mentally retarded is of no consequence to this proceeding. It's irrelevant.

THE COURT: Well, first of all, I thought the doctor was using the three prongs from the rule. I think that's what he was discussing. I understand it's a theoretical situation or a hypothetical situation that he's discussing, perhaps. But I'm [173] going to overrule the objection at this time. Please make it again if you think it's ...

MR. TATTI: Yes, sir.

THE COURT: —germane.

THE WITNESS: So when you are assessing, when you get a numerical or a number as a person's I.Q. estimate after you administer an intellectual test, you know, there is always error in measurement. Any time you use a measuring device, there is error in measurement.

BY MS. RODRIGUEZ:

Q If you make a mistake, you are in error?

A There is always error; it's not a perfect process. So, for example, when you do a poll for a political poll, there is always a plus or minus three or four in doing a political poll. That's also representing that there is error in that measurement of, you know, polling people for political purposes.

Same goes for intellectual testing and other psychological testing. There is error inherent in that measurement. So when we obtain a score that's about two standard deviations below the mean, somewhere

around 70, that's an estimated score. We have to take into account the error measurement, or the measurement error in that device. So an intellectual measure, the measurement [174] error is plus or minus four. So when you get an estimate, an I.Q. estimate, that's not a person's true I.Q. It's just an estimate. So we construct that error around that obtained score, plus or minus four, and then we can say with a certain level of confidence the person's true I.Q. falls in that range.

So when you have somebody who has an I.Q. of, say, 68, 69, 67, that person can still not be mentally retarded. It's important at that point that you have to assess adaptive behavior, because the whole relevant issue from the clinical perspective is, does the person's intellectual limitations impair his ability to function independently in society. So you have to assess adaptive skills. If their adaptive skills are adequate, even though they have an I.Q. of 67 or 68, they are not mentally retarded.

Q All right. So that I understand your testimony, an I.Q. score alone does not establish mental retardation?

A That's correct.

Q Now, I believe you also said that the third prong, prior to age 18, is not discretionary. It's required for a showing of some type of—evidence of, if you will, mental retardation?

A Right, because it's a developmental disability [175] as opposed to some other kind of disability generated by a head injury or generated by substance abuse or Alzheimer's disease, where cognitive limitations can be present. But to distinguish those kinds of deficits from mental retardation, mental retardation is a devel-

opmental disability. You usually observe it in children after they are born in the developmental years, all the way up to the age of 18 when they are generally fully developed.

Q So hypothetically, if you have a score below 70 and you also have with it the deficits, but you have no evidence whatsoever of any mental retardation, anywhere in the record prior to age 18, are you able to make a diagnosis of mental retardation?

A I mean, it would be very difficult if just—there was no information available. If information is available prior to the age of 18 that suggests a person didn't have those deficits prior to the age of 18, then you could say with a reasonable degree of psychological certainty that the person is not mentally retarded, because in the developmental years there is evidence that he didn't have the deficits.

Q What are the things that you look for when you are looking for those deficits to establish the third prong?

[176]

A Well, I mean, it's deficiencies in adaptive behavior. In other words, when you compare the individual you are assessing to same-age peers, are there deficits in the person's ability to adapt to the point that, essentially, they need help in taking care of daily life demands.

Q What type of information do you gather in doing that?

A The best way to gather it is if you have relatives who were with the person when they were developing, prior to the age of 18. You want to know about his academic functioning, how well he communicated.

Was he able to manage money? Did he have a lot of friends? You know, things that have to do with adaptive proficiency and whether a person can be considered as, you know, adapting normally, compared to same-age peers or subnormally.

Q In Mr. Hall's case, specifically, did you attempt to look for evidence with regards to the third prong?

A Yes.

Q And what evidence, if any, did you find in this record?

MR. TATTI: Again, I know your Honor has given me a continuing objection to this line, but she has [177] not, to this point, complied with the Court's order in limine directing that some evidence be presented at this point that Mr. Hall's I.Q. is 70 or below. And, therefore, all of this with regard to Mr. Hall specifically is irrelevant to this proceeding.

MS. RODRIGUEZ: Your Honor, my response to that is that this expert testified that the third prong is not discretionary on his part. So it's very relevant to this proceeding for this Court to hear evidence as to the third prong in the mental retardation diagnosis. It—the testimony that this witness has provided is that, while you can have an I.Q. under 70 and not be mentally retarded, you must have evidence in the record for him to have had mental retardation prior to age 18.

So contrary to the state's position that I.Q, in and of itself, can determine mental retardation, this witness has indicated that the onset must be looked at in all of these cases before you can make this particular diagnosis. And if you don't have the evidence as to onset, I suggest to the Court that that's the criteria for being able to make the—you know, the diagnosis, not I.Q.

alone as the state's suggested to the Court in its motion in limine.

[178]

THE COURT: Counsel, you know as well as everyone in this courtroom that there are three prongs, and that you have to meet all three prongs, and the failure to meet any one of those three prongs means the defense fails. You also have to meet them by clear and convincing evidence.

MS. RODRIGUEZ: I understand that.

THE COURT: Based on the motion in limine that I have already granted yesterday, you need to first put into the record some evidence that Mr. Hall has an I.Q. under 70. To this point, I don't believe that there was anything to that effect. And, therefore, based on my ruling on the motion in limine yesterday, the state's objection is well taken.

BY MS. RODRIGUEZ:

Q Dr. Prichard, did you review the history of the test scores in Mr. Hall's case?

A Yes.

Q And in reviewing that history, was there any data to suggest that there were any scores below 70?

A Yes.

Q And if you would, please elaborate on that for the Court.

MR. TATTI: And if part of that is [179] Dr. Mosman's report, I object.

THE COURT: All right. And I presume that's what the witness will rely upon. So I'm going to sus-

tain the objection. However, at this point, you may proffer the evidence into the record.

MS. RODRIGUEZ: You may answer.

THE COURT: You may answer the question.

THE WITNESS: Okay. All right. I would say that there are several scores that suggest Mr. Hall's I.Q. is potentially under 70. When I consider in my analysis the obvious measurement error, so including my own result of a full-scale score of 71, but I will take them one at a time. Dr. Mosman's evaluation conducted in 2001, he administered WAIS, Wechsler Adult Intelligence Scale-Third Edition. And his I.Q., full-scale I.Q., was a 69 for Mr. Hall.

THE COURT: What year was that?

THE WITNESS: That was 2001, sir.

THE COURT: Okay.

THE WITNESS: So that was a full-scale score below 70. Now, again, there was my evaluation where I had a full-scale score of 71. Essentially it's an identical score from Dr. Mosman's full-scale of 71 versus a full-scale of 69 is [180] statistically not even close to being different. So, essentially, they are identical scores.

Again, it's the obtained score of 71 versus the true I.Q. score, which is going to fall within a certain range when you consider the measurement error of plus or minus three or four. So, in my case, obtained score of 71, you are talking about a potential true I.Q. score of about 67, 68, up to about 76. So that would also apply—the same kind of analysis would apply to Dr. Krop's evaluation of Mr. Hall in 1990, and Dr. Krop's full-scale score was a 73.

THE COURT: What was the date of your test, sir?

THE WITNESS: My test was August 15th of 2002.

BY MS. RODRIGUEZ:

Q How did you learn of Dr. Mosman's testing?

A I received a report that Dr. Mosman generated in 2001.

Q Was that report something you relied upon in making a decision in this case?

A Yes. I mean, the—any background historical I.Q. testing, for me, is relevant to the analysis.

Q It was not the sole matter that you reviewed [181] upon [sic]?

A It's not the sole matter I relied upon, no.

Q Do you have a copy of your documents with you?

A I—you actually took most of my documents last night. What are you looking for?

Q Those that you relied upon.

A No, I don't have all those. I have Dr. Mosman's report.

Q That's where I'm going. Do you have Dr. Mosman's report?

A Yes, I've got Dr. Mosman's report.

MR. NUNNELLEY: We are still on proffer, right, Judge?

THE COURT: That is still a proffer.

BY MS. RODRIGUEZ:

Q Having reviewed Dr. Mosman's report, what did you find, if anything, with regard to the contents of

this report? Did you review the way the test was administered?

A Well, I couldn't really do that. I just had to review his reported scores and in—it's a lengthy report. It talks about some of the same things that I attended to, which was Mr. Hall's problems in school, in education, some recognition that he had some trouble in the Department of Corrections when he was first there, [182] in the late 1960s.

Dr. Mosman commented on some prior testing that had been conducted with Mr. Hall and just reported his I.Q. result with the Wechsler Adult Intelligence Scale-Third Edition, verbal I.Q. of 73, performance I.Q. of 70, full-scale I.Q. score of 69.

He also administered what's called the Leiter Intelligence Scale that is an approved measure for—I have not used that scale, but on the Leiter, he reports a score of, I believe it was, 53. And he also did testing with the Vineland Adaptive Behavior Scales, and the Adaptive Behavior Composite was a 51.

Q What type of adaptive behavior scale or measurement do you use, what instrument?

A He [sic] used the Vineland Adaptive Behavior Scale.

Q Would that have been the same instrument you would have used?

A Correct.

Q Turning back to the report itself, is it a lengthy report, Dr. Prichard?

A Yes, it is.

Q How many pages is this report?

A It is 17.

Q And it begins with a summary, if you will, of [183] his position with regards to Mr. Hall's mental status?

A Yes.

Q And what did Dr. Mosman find that to be or communicate to you in his report?

MR. TATTI: Judge, I understand we're still on this proffer, but this is exactly why I made the objection I made. She's going to elicit the words of Dr. Mosman from another witness without me having any ability at all to cross-examine, and it's patently unfair. And I want the record to be clear that I object to this entire line of questioning relating to Dr. Mosman's test scores or his report, regardless of how long it is.

MS. RODRIGUEZ: Your Honor, it's a proffer, I would submit to the Court. And in order to have a full proffer for the purposes of the review at the conclusion of this hearing, I'm required to put the information before the Court. And that is the purpose of my questions at this—

I'm sorry, your Honor, I can't—

MR. TATTI: He was talking to me.

MS. RODRIGUEZ: I know, but ...

MR. NUNNELLEY: Are we no longer entitled to converse between counsel, Judge?

MS. RODRIGUEZ: Quietly.

[184]

MR. TATTI: I can't hear very well, so that's part of the problem.

Judge, I understand her obligation. But the appellate courts have made it very clear, I'm under an obligation to object.

THE COURT: Right.

MR. TATTI: And my failure to do so waives what would otherwise be a perfectly legitimate claim. So I'm going to object when I feel the need. And when she begins to ask the witness to read and quote from this report which I have objected to, I felt the need to register my objection again.

THE COURT: I note your objection. It's a continuing objection. I will note again for the record, this is strictly a proffer. This is not competent, substantial evidence at this point. You may proceed.

BY MS. RODRIGUEZ:

Q In his summary, Dr. Mosman communicates to you with regard to the performance, if you will, of Mr. Hall and the performance in particular with regards to the—both the I.Q. and the adaptive behavior components with regards to the issue being the mental retardation issue.

A Correct.

[185]

Q If you could, summarize for me if you would—

A Basically—

Q —what his position was.

A —right. Dr. Mosman said, based on his testing and analysis of records, that he believed Mr. Hall demonstrated significantly subaverage intellectual abilities, two standard deviations or more below the mean of 100 in terms of intelligence, deficits and adaptive

skills as measured by the Vineland Adaptive Behavior Scales, and manifestation of these deficits prior to the age of 18.

So Dr. Mosman's position was that Mr. Hall should be considered mentally retarded.

Q On Page 7, if you will, Dr. Mosman talks about the specific tests that were used in this particular case, the instruments. I believe you mentioned them briefly previously. If you would, please share with the Court the particular instruments that were used or part of this evaluation.

A The Wechsler Adult Intelligence Scale-Third Edition, the Leiter Adult Intelligence Scale, and the Vineland Adaptive Behavior Scales. And, yeah, he did administer more here. Hang on just a minute, I can tell you that. He also administered the Slosson, which is another intelligence scale; the Wide Range Achievement [186] Test-Third Edition. He did Trail Making A and Trail Making B.

Q Can you just describe what those tests are briefly?

A Well, the Slosson is just kind of a down-and-dirty I.Q. measure. It's not an approved measure for determining actual I.Q. It's good for rapid administration, basically, if you want to get kind of a screening of somebody's intellect. Wide Range Achievement Test is kind of an abbreviated psychoeducational test, where you are going to get a basic look at somebody's ability in terms of reading, arithmetic and reading. Trail Making is just kind of a memory and task that you—a processing speed task that a person is asked to perform. And they have to do it as quickly as possible and it's

timed, and that are timed and their error rate is compared to a developmental sample.

Q What did all the results of all those tests show in this report, if you will?

A As I mentioned, the WAIS-III, Wechsler Intelligence Scale-Third Edition, was a full-scale of zero 69. The Leiter Adult Intelligence Scale was a full-scale of 052. The Slosson, he reported mental age and not I.Q. The mental age was that of a ten-year, [187] six-month-old child. Wide Range Achievement Test-Third Edition, he also, again, reported age equivalents, rather than actual scores. And the age equivalent was about seven and eight years old for the academic tasks measured on that instrument.

Trail Making, it took him a long time to perform the task and he had a—a lot of errors. He was three standard deviations away from the mean of the developmental group, when you compare his speed and error rate. On the Vineland his composite score was a 51. So basically, Dr. Mosman was characterizing that on all the instruments he administered, Mr. Hall evidenced deficits that he felt were consistent with retardation.

Q Are all those instruments recognized instruments that are used in the course of your profession?

A Yeah. Some are better than others. The WAIS, the Wechsler Scales, is basically the state-of-the-art in terms of measuring intelligence. The Leiter is a lesser used, but it's well-founded in the profession; it's well-respected in the profession. Vineland is an instrument, adaptive instrument, that's probably the state-of-the-art in terms of measuring adaptive behavior.

Now the Slosson, the Trail Making A and B, the [188] WRAT, those are more screening devices. Those

aren't really devices that most clinicians would use in terms of trying to make a decision about whether a person is mentally retarded or not.

Q If you are working with a dual-diagnosis individual that might have mental health issues as well, would those other tests be appropriate to bring into the picture?

A Not really. My thinking is you either do a screening version if you are not really—like, for example, you do the Slosson if you are not really interested in knowing—if the critical issue is not a person's intellect, you use the Slosson just to get an idea of his intellect.

Q Does it corroborate, then you go further maybe and do another test?

A Maybe. You know, in terms of how you communicate with a person if he's borderline intellectually, according to Slosson, then you pay attention to that. If the Slosson says he's mentally retarded, you might then administer Wechsler Scale to get a better look at that.

Q Did anything with regard to the testing cause you to have any concern with regards to how Dr. Mosman communicated to you any of these results?

[189]

A No. I mean, Dr. Mosman—I didn't know him, but he sounded like a competent person in terms of just reading his report.

Q Now, on Page 11 of this report, he gave a diagnostic discussion and actually has Axis I, Axis II, another axis here, and diagnostic numbers that correspond. They correspond to the different diagnoses?

A Yes, ma'am.

Q And if you would share with the Court the diagnostic discussion?

A Okay. Basically, on Axis I, there is—Axis I is a main clinical disorders. Axis II is where we put if a person has a developmental disability or a personality disorder. So that's basically the two important axes. On Axis I, Dr. Mosman said that he felt Mr. Hall had a reading disorder. Also felt Mr. Hall had a mathematics disorder. Also a disorder of written expression, diagnosed him with schizophrenia, undifferentiated type. Physical abuse as a child and neglect as a child. Those would be things that are not really diagnoses but something that a clinician should pay attention to if they are doing therapy with them or something.

On Axis II, he diagnosed him with mild mental retardation. Also indicated that some testing suggested [190] moderate mental retardation.

Q He did not diagnose him as moderately mentally retarded, however, did he?

A No, he said the more conservative diagnosis would be mild mental retardation.

Q And the final axis, is that just a summary of some sort?

A The final axis, that's, let's see, he left out a Roman numeral on that last axis.

Q That would be III normally?

A Probably, yes. Axis III would be any medical issue, so I think he's saying that it looks like organic brain damage. Although he left out the Roman numeral III on that axis.

Q Did he conclude that mental retardation was the primary mental disorder?

A Yes.

Q There are a number of references in the testing as to mental age of this particular defendant. Is this consistent with the information that you had or reviewed in your own testing? Not that that's significant to this issue. I'm offering it for the benefits of this proffer.

A Would you ask the question again?

Q Sure. There is a lot of reference in this [191] report to mental age issues?

A Right.

Q And the question is, is that consistent with what you saw in your testing and your reports?

A Yes, when you get somebody who is mildly mentally retarded, their capacity is going to be at a sixth grade level. That doesn't mean that all mentally retarded folks can function at a sixth grade level. It means their capacity for a mildly mentally retarded person is about sixth grade, so it's about age 12.

So it's really in communicating—if a 20- or 30- or 40-year-old has limitations communicating in terms of mental age, it just gives a good idea that the person is functioning about like a ten-year-old or fourth grader, whatever. So yeah, when he's scoring about a—my I.Q. was 71, you are talking about the lower 2 percentile. You know, so you are talking about less than sixth grade functioning.

Q There is some language with regards to a diagnosis of schizophrenia here, along with the mental retardation. And the question is, can both of these diagnoses exist together at the same time?

A Yes.

Q And there's some discussion with regards to Vineland testing and the differentiation between mental [192] retardation and psychosis and some language with regards to that. Now, could you elaborate on that for us?

A Well, I mean, when you—when you have somebody who is demonstrating some deficits you want to try to determine whether or not those deficits are generated by a psychotic mental illness like schizophrenia versus perhaps an intellectual or cognitive issue like mental retardation, you know, it's an important differential diagnosis and important thing to try to sort out as a clinician. If you see the deficits, is it because of a psychosis or, conversely, is it because of a developmental disability.

Q And is the Vineland used for that?

A Yes.

Q Is that what it's saying basically?

A Right. It's a good way to try to discriminate between exclusively a psychotic illness that's creating some cognitive issues versus an actual developmental disability.

Q Dr. Mosman completed a formal Vineland behavior analysis—

A Correct.

Q —according to this lengthy report. And recorded some information with regards to that particular testing. Doctor, if you could, just state [193] for the record what the results of that testing showed.

A Well, the testing on the Vineland is broken down into generally three areas. It's communication domain, daily-living domain, and socialization domain,

pretty self-explanatory. Communication has to do with receptive, expressive written communication. Daily living has do with how well the person functions around the house, brushes his teeth, cleans his room, puts on his clothes. Socialization has to do with how well they socialize with other people in the community at large.

On the Vineland that Dr. Mosman administered, I don't know who he administered it with. There has to be a responder. There has to be somebody reporting on the skills of Mr. Hall.

Q This is the same test that you administered, as well?

A Correct. And Dr. Mosman reported a communication score of 40. And again, this is the same scale as the intellectual measures. A mean is 100, standard deviation is 15. So two standard deviations below the mean is 70. Anything below that is considered to be adaptive deficits representing mental retardation ordinarily. Communication score of 40, daily living score of 56, socialization score of 71, and the cumulative or combined adaptive behavior composite score [194] was a 51.

Q What was his conclusion with regards to the meaning of those particular scores?

A That he was demonstrating—that Mr. Hall was demonstrating adaptive deficits in a number of areas that were three standard deviations below the mean and believed that it was because of his cognitive or intellectual limitations.

Q Where did he find his more severe difficulties to be occurring?

A In communication. It was his standard score in communication was a 40, so that's essentially expres-

sive and receptive communication skills and written communication skills.

Q Which did he find worse?

A (No audible response.)

Q Did he find him to have severe difficulties in the written language, in the areas of communication, in his writing in particular?

A Yes.

Q Was that a focus that he pointed out?

A Yes.

Q And in community and domestic areas, he found him to have a problem in that area?

A Yes. Community and domestic, these are kind [195] of subdomains in the daily living area and he felt that he had moderate—mild to moderate deficits in those areas.

Q And he reported socialization domain as well as having problems in those areas?

A Right, deficits in interpersonal relationships, coping skills, and time structuring.

Q And finally, I believe you testified that the composite score—what was that again?

A 51.

Q That means what, Doctor?

A Well, it's—you are considering standard—mean of 100 and standard deviation of 15. So you are looking at the deficits consistent with mental retardation are two standard deviations below the mean. So a score of 51 is more than three deviations below mean, so, you know, Dr. Mosman is representing that this

shows his adaptive deficits that are consistent with mild to moderate mental retardation.

Q Anything in the way that this was administered, upon reading it, that caused you to have any questions or concerns with regard to how the Vineland Adaptive scales were administered?

A I don't know how it was administered. You know, I didn't talk to Dr. Mosman. I have no idea how [196] it was administered. But I'm assuming that—he sounds like a competent person is all that I know.

Q But nothing you saw in the written format was anything different than what you would do yourself if you were conducting this evaluation?

A Right.

Q Okay. Finally, the WAIS-III, is that a actual test?

A The WAIS-III is an intelligence test. It's the Wechsler Scale Intelligence test that's used most broadly in the profession. This was the Third Edition, Roman numeral III, so Wechsler Adult Intelligence Scale-Third Edition. That's what Dr. Mosman used when he met with Mr. Hall in 2001.

Q How was his processing speed?

A It was 69, which is the second percentile. Again, that's—you know, it's slow. It's right there on the line. You know, 70, a little below, a little above, it's right there on the line. So it was consistent with his full-scale score.

Q Is it consistent with that of a mentally retarded person?

A Yes. I mean, yeah. I mean, obviously, it's all those scores, verbal performance, full-scale processing speed, it hovers right around that mark of [197] 70. So that's the issue. Obviously, the person has intellectual limitations; they are subaverage because average is 100. And then the determination becomes, within that range close to 70, do those limitations affect his ability to adapt well? That's really the question.

So, yeah, it's consistent with mental retardation, borderline I.Q., somewhere right around there.

Q Is the statement accurate that out of 100 people in the same peer group, 98 would be able to do better?

A Right, he's functioning in the second percentile. So, yes. That's how we compare. We compare the same-aged peers and what they scored on this measure at the same age. That's how we can make the comparison and communicate that he's in the second percentile, meaning that 98 out of 100 people his own age are going to do better than Mr. Hall did.

Q I believe you testified earlier that there were a number of other tests that he conducted as well, one being the Leiter Adult Intelligence Scale?

A Right.

Q And this test is used for some special purposes?

[198]

A I've never used the Leiter, but, yes, it is, you know, if you can't for some reason do the Wechsler or the Stanford-Binet, then your third option would be the Leiter.

Q So it is a test that is used by professionals in your field?

A Yes.

Q What were the results on that test?

A Verbal I.Q. score of 55, performance I.Q. score 47, and full-scale I.Q. score of 52.

Q Were these scales higher or lower than Wechsler's?

A That was lower. The Wechsler scale was a full-scale of 69. The Leiter was a full-scale of 52.

Q I believe you spoke earlier that some of these tests are used as corroborative purposes?

A They can be, yes.

Q This Slosson test was also administered?

A Correct.

Q What is Slosson?

A Slosson I.Q. is kind of a quickly administered screening I.Q. measure, more than anything else. It's often administered in, like, the Department of Corrections and other places where you don't have a lot of time to spend with each individual.

[199]

Q He communicated Mr. Hall's results?

A Well, he communicated his age equivalent. There is an I.Q. that the Slosson gives you, but he instead communicated the age equivalent for Mr. Hall's score. And that was a ten—equivalent to a ten-year, six-month-old child.

Q He tested his ability to do math and arithmetic problems on the Wide Range Achievement Test-Revision 3?

A Correct.

Q And that test reveals what about an individual?

A It's basically a screening device in psychoeducational functioning, which means instead of doing a Woodcock-Johnson, for example, which is a very extensive psychoeducational battery, the Wide Range Achievement Test is kind of a screening version of academy functioning in the area of spelling, reading, and arithmetic.

Q What did he find with regards to the problems?

A He was functioning—again, he doesn't report standard scores, but he reported age equivalent. So basically, Dr. Mosman is saying that his scores represent scores consistent with about a seven- or eight-year-old child, which would have been about second [200] or third grade.

Q Is he able to add two numbers with two digits in each number?

A It says he cannot add two numbers with two digits in each number.

Q Trail Making A and B is another test?

A Right.

Q Did he administer both or just one of those?

A Looks like just Trail Making B.

Q What was the purpose of that?

A It's a good measure for brain damage, kind of like the Bender-Gestalt.

Q But it doesn't come to play at all here in terms of the mental retardation diagnosis?

A Some professionals try to say that it demonstrates some cognitive issues, but I don't know why you would use it if you could use something else.

Q Okay. There is information that follows in Dr. Mosman's report with regards to diagnostic and the diagnoses of mental retardation with regards to referral for services, I believe—I'm trying to paraphrase this—to the Department of Developmental Services. And as it relates to a—you know, a diagnosis during the time he was in school, his school period. Is that an analysis that you would do with regards to the third [201] prong that we were speaking about earlier? Would you look back to see what referrals were made? I'm trying to get an idea of what the purpose—

A Potentially, I mean, you have to do it. You have to—to answer the question about whether the person is mentally retarded, you have to—a big focus is going to be pre-18 because that's where the deficits have to be first noticed and documented. So, you know, part of what you could do is certainly look for referrals prior to the age of 18 that demonstrate that he was recognized as somebody with intellectual issues.

Q So in addition to your evaluation at this point, you would have to do a retrospective evaluation of prior to age 18 to look and see what's out there?

A Right. You just have to do it if you are going to do a competent evaluation. You can—for example, if I went and tested somebody today, and I administered the Wechsler Scale immediately and he scored a 102, I would have to go no further. The question would be answered.

But—so it's kind of a progression of things. If he's going to score somewhere in the area of 70 on an I.Q.,

then I have to go back and look pre-18 and see what I can discover about school records and adaptive functioning at that time, any intellectual [202] testing that was conducted at that time, any referrals that may have suggested he may have had some intellectual limitations or other limitations, learning disabilities or whatever. So that is how you kind of proceed.

Q I believe that you did review the school records in Mr. Hall's case and those are listed in your report as part of your review?

A Yes, ma'am.

Q And you reviewed records of Dr. Carrera?

A Yes.

Q And with regards to Dr. Carrera, is there anything in that information that became relevant to you or in Dr. Mosman's report with regard to Dr. Carrera in your final evaluation?

MR. TATTI: I'm a little confused, Judge. Exactly whose—

THE COURT: Now we're tripling, trying to triple bootstrap something?

MS. RODRIGUEZ: Part of the record below, as the state said, one of the experts—it's probably part of the resentencing testimony that we've asked the Court to take note of. I'm simply asking Dr. Prichard if it had any bearing on his opinion. It's listed as one of his documents. I don't know [203] whether it did or didn't.

MR. TATTI: That's not the way the question was asked.

THE COURT: Yeah, I didn't understand it that way at all. You didn't ask this doctor if he relied upon a

certain doctor's report. It sounded to me like you were asking this doctor if Dr. Mosman relied upon—

MS. RODRIGUEZ: I apologize, your Honor. I apologize. I will try to clarify.

MR. NUNNELLEY: Are we done with the proffer then?

THE COURT: No, I don't think so, as far as I'm concerned we're still in the middle of it, because it's—

MS. RODRIGUEZ: That is correct, your Honor.

THE COURT: —rambling on.

MS. RODRIGUEZ: That is true, your Honor. I have to make a record of the testimony. It was not my intent to present in this way, but that's become the issue. So I must put a full proffer in front of the Court.

MR. TATTI: Judge, can I beg the Court's indulgence to take a very brief recess at this point? It's after 10:30.

[204]

THE COURT: About five minutes.

MR. TATTI: Yes, sir. That's all it would take.

THE COURT: I understand. We'll all take a five-minute recess. Doctor, this is somewhat unusual. You are still on the stand. Don't talk about your testimony with anyone during the break. All right?

THE WITNESS: Yes, your Honor.

THE COURT: We'll be in recess, five minutes.

MR. TATTI: Thank you, your Honor.

(A recess was taken.)

THE COURT: Counsel, you may proceed where you left off.

MS. RODRIGUEZ: Thank you, your Honor.

BY MS. RODRIGUEZ:

Q Dr. Prichard, I have reviewed the pages in Dr. Mosman's report through Page 17. And I'm specifically referring to pages 12 through 17, where he reviews other parts of the record, which appear to be part of the record that you may have reviewed, as well.

So my question to you is, in reviewing those pages in Dr. Mosman's report, to you, is there anything in that information in those pages that you relied upon in terms of your opinion in this case?

[205]

A Probably not. I mean, what was important to me is Dr. Mosman's own results, the results of his testing that he performed. Essentially, everything else he's talking about, I had access to also.

Q Yeah, that would be my position. The first portion of the report that we have gone over, that's information that you would normally rely upon in making an opinion in a case?

A Yes.

Q And you did so in this particular case?

A It's one of the things I paid attention to, yes.

Q Now, there were enclosures, apparently, entitled Mental Retardation Forensic Analysis?

A Correct.

Q Did you see receive those, as well?

A Yes.

Q And then there appears to be also a chart of some kind, which looks like a time line, would it be fair to describe it that way?

A Yes, ma'am, right.

Q Was the time line of any use to you in terms of your opinion in this case, relying upon it in any way?

A It just kind of shows the time line—some of [206] the same stuff that I was looking at in my records. So, you know, he organized it well in this time line. But there is nothing in the time line that I was unaware of based on my review of the other records.

Q You relied on it—in order to render a diagnosis in this case, you did look at it?

A Yes, I did look at it.

Q And the mental retardation forensic analysis, looks like a three-page attachment?

A Right.

Q Appears to have just covered the diagnostic criteria and seems to be information with regards to the different types of mental retardation. If you would look those over for accuracy and let me know whether or not you did or did not rely on any portion of that.

A I did read this as part of my original assessment when I reviewed the package related to Mr. Hall. I also read it in preparation for this hearing. So I did look at this, that was prepared by Dr. Mosman. It looks accurate to me.

Q Is there anything else in communications between yourself and Dr. Mosman that you took into consideration in rendering an opinion in this report that I have not addressed in this proffer?

MR. TATTI: Just so the record is clear, the [207] witness has at least two different times said he never spoke with Dr. Mosman.

THE COURT: That was my understanding.

MS. RODRIGUEZ: I was not the attorney, your Honor, I don't know.

THE COURT: I think he said that at least once today, maybe twice. That he's never talked to Dr. Mosman.

MR. TATTI: Never met him.

THE COURT: Yeah, did not know him.

BY MS. RODRIGUEZ:

Q My question was related to this particular report, from any—anything in this report—I guess I should probably say, to refresh your recollection, in the event you had any type of communication with Dr. Mosman in this case, this would be your opportunity to put it on the record.

A If I had any kind of communication with Dr. Mosman, I don't believe I've ever spoken to the man. And the—from his report, I don't think there is anything more than what I've said that I relied on.

Again, what was important to me was his own testing results, just like in every case of every expert, I'm basically interested in their testing results.

[208]

Q How were the results—let me take that back. It's not unusual for you to receive a report in this particular format?

A No, it's not unusual.

Q So in your profession, there is not a particular form you use or something that you must have in order to pass along a report from one psychologist to another?

A Well, in my ethics, my professional ethics, we do not send raw data to anybody. We send raw data to another licensed professional. So, for example, if somebody asked me for raw data on a particular case, say an attorney asks me, I wouldn't send the attorney that raw data. I would have that attorney designate another licensed professional, and I would send it to that licensed professional, and he could then give it to the other attorney. That's just an ethical obligation I have in my profession.

Q Is it not in the administrative code as well, or do you know?

A I'm not sure if it's in the administrative code.

Q Do other psychologists use the same practice, or are you the only person?

A No, I mean, they should. It's part of our [209] ethical obligation, and it's basically about test security. You don't just send raw data to people who haven't been trained in what that means and stuff.

Q So in the cases that you are involved in, you do not send that information to counsel?

A No.

MS. RODRIGUEZ: Your Honor, at this point I think that the proffer is concluded. I would point to the Court—point out to the Court 90.704, which is the disclosure of facts or data relied upon by an expert. When an expert—and cite for the Court Ehrhardt, Florida Evidence Code at page 747 says when an expert relies upon inadmissible evidence under 90.704 in the form of

an opinion, the expert can ordinarily testify to the source of the facts or data relied upon in forming the opinion. For example, an emergency room doctor who treats a child should be able to testify that she relied on the—

THE COURT: Excuse me. What are you reading from?

MS. RODRIGUEZ: Ehrhardt.

THE COURT: So you are reading from a commentary by Mr. Ehrhardt, Professor Ehrhardt?

MS. RODRIGUEZ: Yes, your Honor, I'm sorry. [210] 2009 Edition, West Florida Practice Series. And it's Section 90.704, which deals with the—gives an example of radiologist concerning the patient's x-rays or hearsay statements in the emergency room, regardless of whether the statements are admissible under a hearsay exception. And it discusses *J.V. v. Department of Children and Family Services*, 967 So.2d 354, which is a Florida Third DCA case, 2007. And also *Linn v. Fossum*, being 946 So.2d 1032, 1036, Florida, 2006.

And I would submit to the Court that the testimony given in the form of the proffer should be admitted as evidence as, in the course of the profession, being psychologists, clinical psychologists, it is not unusual for them to rely upon the opinion of another expert in the form of the letter submitted by Dr. Mosman in forming his opinion, and that this witness should be allowed to do so, and that this is the cite. Regardless of the—whether the statements are admissible or not under the hearsay exceptions, those would be the preliminary cases that I would bring to the Court's attention to grant the defense's request to allow this as evidence in this case.

THE COURT: That still doesn't get around the [211] fact that there was a Court order that you were supposed to provide all the underlying data that was being relied upon, and that was not provided. And I don't think this case goes to that issue.

MS. RODRIGUEZ: I would submit that exclusion of this testimony at this time is too severe a sanction. I would submit to the Court that, as counsel of record—and I've been on this case for at least a couple of years—I have made every effort to comply with the Court's order. I would submit to the Court that the witness testified that the raw material would have gone directly between experts, is his practice, in order to have the material travel. It would never have come to the attorney.

I would submit to the Court that the prior counsel may not have known the information did not reach the state because the state never put counsel on notice that they didn't have it. And I took a deposition myself of the expert for the state and at no time did that expert rely on—communicate to me that he did not have this raw material and needed to get it from me or I would have provided that material to him.

So I would suggest to the Court that the [212] defense was not on notice that they didn't have the raw material, and excluding this evidence at this point in time would be prejudicial to our case. And I would suggest to the Court that it would be too severe a sanction for the Court to undertake.

THE COURT: State wish to put anything on the record regarding that issue?

MR. TATTI: No, your Honor. I believe I have clearly stated my position on this matter.

And, frankly, my understanding is that Dr. Mosman died in May of 2007. So why Dr. Prichard's report was attached to their motion versus Dr. Mosman's is frankly a mystery to me today. Because Dr. Mosman was alive at the time this pleading was filed. And yet counsel chose to attach Dr. Prichard's report and identify him as the expert on whom they rely.

Frankly, Judge, I would engage in gross speculation to try to figure out why it was they attached Dr. Prichard's report instead of Dr. Mosman's. And all of these suspicions lead me to a bad place in terms of the reliability of Dr. Mosman's report, if he was, in fact, alive. And according to the information I have, he died in early May of 2007. But Dr. Prichard was identified [213] as the expert upon whom the defendant was relying in advancing his claim under Florida law that he was mentally retarded such that he may not be executed and Dr. Prichard's report says his I.Q. is 71. And lo and behold, the Supreme Court now says 70 or below is mentally retarded and anything above it isn't.

But I cannot more clearly express the frustration in my inability to cross-examine Dr. Mosman that went on during this proffer. Repeatedly, Dr. Prichard said, I don't know why he did that; this is a score that goes with this, but he didn't put the score; there is, at least, a typographical error on the axis. There were several errors that Dr. Prichard was able to identify in the report and was unable to explain why Dr. Mosman did what he did on several instances in the report.

I would suggest the evidence is unreliable (a) because it's hearsay, (b) because I have no opportunity to rebut it, much less a fair opportunity to rebut it. And even Dr. Prichard does not have the raw data that was the foundation for the report that he reviewed.

So my position is the same: It is grossly [214] unfair, in this proceeding, with the issues before the Court, to allow this expert to be a conduit for information on the ultimate issue without any opportunity to address it.

THE COURT: The defense knew what their burden was and they knew what the law required. And if Dr. Mosman was the person that had the vital test that they needed, Dr. Mosman should have been—at least his testimony should have been perpetuated in some way, or something, so that it could have been properly utilized. At the very least, if it was that important, the raw data should have been provided in some form to counsel for the state, at the very least, through their expert, and that was not done.

I do acknowledge that it's a harsh result, perhaps, certainly from the defense perspective. But as I understand the law, that's the law. And my job is to follow the law. And the Court's ruling on that issue remains the same.

BY MS. RODRIGUEZ:

Q Dr. Prichard, at some point, did you have an opportunity yourself to assess Mr. Hall?

A Yes, I did.

Q And when—

[215]

THE COURT: Just one—in your mind, Counsel, are you now out of the proffer and back on—

MS. RODRIGUEZ: Sorry, yes.

THE COURT: —direct, back on direct?

MS. RODRIGUEZ: Yes, your Honor.

THE COURT: Thank you.

THE WITNESS: I assessed Mr. Hall August 14th and August 15th of 2002 at the Union Correctional Institution's Death Row.

BY MS. RODRIGUEZ:

Q And, if you would, please describe the steps you took to assess him.

A The records that have been mentioned, I reviewed those records, I took note of things that were relevant to my assessment. When I saw Mr. Hall, I got a history from him, I interviewed him. And then I did testing with him. I did an intellectual measure, the Wechsler Adult Intelligence Scale-Third Edition. I also administered the Wide Range Achievement Test with him. I also spoke to his sister Ms. Deana Rigsby and to her—or excuse me, to his brother Mr. James Hall. I spoke with them about his basic history, and I also spoke with them in order to do adaptive testing with them, utilizing the Vineland Adaptive Behavior Scales.

Q Doctor, if you would, I think before the [216] proffer, we talked about the items that you consulted, and those are listed on the front of your report, I believe, the various items that you reviewed and we went through that list.

A Yes, ma'am.

Q And included in that list, you also reviewed school records for Mr. Hall?

A Yes.

MS. RODRIGUEZ: Your Honor, just so the record is clear, I'm going to ....

(Whereupon a discussion was had off the record at counsel for the state's table.)

MR. TATTI: You would handle it by marking Dr. Mosman's report and exhibit, separating it from this other material. That's how.

MS. RODRIGUEZ: Yes, yeah, yeah.

Your Honor, we're going to take the Mosman material out of this package and have this entered into evidence, and that would be without state's objection once that's removed, correct?

MR. TATTI: I understand that Dr. Mosman's report and the attachments you referred to are going to be marked and made part of the record attendant to the proffer, but you are going to take it out.

[217]

MS. RODRIGUEZ: Even though it's referenced in the front of his package as being something that he reviewed, the state is suggesting that we take it out of this package. I guess I should ask the Court how it wants it done.

THE COURT: What are you trying to do?

MS. RODRIGUEZ: I'm trying to admit the documents reviewed by Dr. Prichard that's listed as documents he reviewed in forming an opinion in this case. Of those documents he did review, Dr. Mosman's, which is listed in the index that we prepared, as Number 12. The question is, and the discussion with the state, is how to handle that. The state would like Number 12 pulled from this package.

THE COURT: Separated? Is that the state's position?

MR. TATTI: I wouldn't have an objection to the packet if Dr. Mosman's material is removed.

THE COURT: All right. Let's do them separately. Dr. Mosman's will be a proffered exhibit only, not admitted. The other will come in without objection?

MR. TATTI: Yes, sir.

MR. NUNNELLEY: Judge, if I could step out to [218] make a witness management phone call?

THE COURT: Certainly. Okay if we proceed in your absence?

MR. NUNNELLEY: Certainly.

BY MS. RODRIGUEZ:

Q Based upon your training and experience, Dr. Prichard, were you confident that Mr. Hall made every effort to perform the test to the best of his ability?

A Yes, he seemed to be. I didn't have any suspicion that he wasn't performing optimally. He seemed to be honest with me, comparing what he told me to his history that I had already reviewed, and seemed to be working as hard as he could.

Q I believe you testified earlier with regards to the actual test that you utilized?

A Yes.

Q If you could explain your findings with regards to Mr. Hall's I.Q. test?

A The I.Q. test that I administered with him?

Q Yes, sir.

A I administered Wechsler Adult Intelligence Scale-Third Edition. My results were a verbal I.Q.

score of 74, a performance I.Q. of 73, and a full-scale I.Q. score of 71.

[219]

Q Now, having administered the I.Q. test, what is the—let me ask you this, having administered the I.Q. test, what did you do next? Did you review the record?

A Well, I had already reviewed the record pretty much when I saw him. Then when I—before I saw him, I had reviewed most of the record provided to me. I administered the intelligence testing with him. I then administered the Wide Range Achievement Test, the academic screening test with him. Um—

Q Now, in reviewing the records and in reviewing his prior testing with regards to his pre-18 scores, did you come across any intelligence tests that were out there that would have shown a score on a recognized I.Q. test?

A Not an I.Q. score. What I did come across, I saw school records and I reviewed the school records. The thing that struck me about school records, although I did not see any formal I.Q. testing in the school environment, it doesn't mean it wasn't done, but it wasn't available to me to review. In 1952, when he was about six or seven years old, there is a note in his school records that said his mental maturity is far below his chronological age.

'53, age seven and eight, I have found Freddie [220] to be very inattentive and extra slow in comprehension. In 1954, age eight and nine, he is slow in all of his work. 1955, age nine and ten they said he is mentally retarded. 1956, age ten and 11, Freddie is slow in all phases of his work. 1957, age 11 and 12, mentally retarded. 1958,

age 12 and 13, described as mentally retarded. 1961, age 15 and 16, also described as mentally retarded.

So what was relevant to me is that throughout school, between '52 and '61, he was described in terms that certainly represent to me that he had some academic difficulties and appeared to the people who were trying to teach him to have cognitive limitations, because he was described as mentally retarded, several times.

Q And in your review of these materials, you also looked at transcripts of the resentencing proceedings?

A Yes.

Q And did you review testimony of Ms. Hannah Foster, who was the superintendent of schools for Sumter County?

A I'm sure I did. I didn't review it in preparation for this hearing.

Q Listed on your report, in the front of your report, you have a number of documents that you [221] reviewed?

A Correct.

Q If you could, take a look at that?

A Right.

Q And in the course of your reporting of the school record information—

A Right.

Q —would it assist you if I could show you a copy of the report?

A Um.

(Whereupon, a discussion was held off the record at counsel for the state's table.)

THE WITNESS: Sure. I'm not sure what you are talking about at this point.

MS. RODRIGUEZ: (Tendering document.)

THE WITNESS: Yes, right. That is what I reviewed, yes.

(Defendant's Exhibit D identified for purposes of the record.)

MS. RODRIGUEZ: Let the record reflect that the witness has reviewed an exhibit previously marked as clerk's Exhibit D.

BY MS. RODRIGUEZ:

Q And are those the report cards that you were just referring to, the records?

[222]

A Yes.

MS. RODRIGUEZ: Your Honor, I would seek to admit these as an exhibit. They are part of the documents that were submitted with the initial report?

MR. TATTI: They have already been admitted. They are part of the original packet.

MS. RODRIGUEZ: I just duplicated them, your Honor, so it would be easier for us to take into consideration in the closings.

THE COURT: It's a school record separately that you now want in evidence?

MS. RODRIGUEZ: Yes, your Honor, that the witness reviewed with regards to the mental retardation, comments that were on the report.

THE COURT: State have any objection to that?

MR. TATTI: Other than that it's to some extent cumulative, no, sir.

THE COURT: All right. Overlooking that issue, the school records of the defendant will be in evidence as Defendant's Exhibit what?

THE CLERK: It will be 4.

THE COURT: Okay. Defense 4.

(Defendant's Exhibit 4 received in evidence.)

[223]

BY MS. RODRIGUEZ:

Q Were you able to corroborate any of the information I believe that you testified to?

A Well, what I did is I noted that in the Department of Corrections records, when he was in the Department of Corrections in '68, '69, I think up to '72 or '73, there is reference to his school functioning as being poor, that he was, basically, socially promoted in school. Academically, he was not very good, but apparently, he was a pretty good football player. So he was socially promoted.

I also noted in the Department of Corrections a parental questionnaire. When I assessed Mr. Hall, his mother was deceased, but in a parental questionnaire from 1968, his mother said the same thing, that he—it was hard to learn in school, that he couldn't learn, that he had head trouble and that he made no progress. So it appeared to me that the school records were saying, obviously, that he had some limitations. Mom was saying it in 1968. Department of Corrections was saying it

around that time, as well. And I spoke to his sister and his brother, Deana Rigsby and James Hall.

Q Now, in the DOC information that you mentioned before, did you review a presentence investigation report dated December 20th, 1968?

[224]

A Yes.

Q What information did you learn from that report?

A Part of what I learned from that is there was reference to Mr. Hall not having history of an emotional disturbance, but appeared to be functioning below normal level, as was socially promoted in school and classified 4F, for intelligence purposes.

That reference is in reference to, in 1965, Mr. Hall tried to get into the military. But he was tested and he was classified 4F, because his score on the examination that was given for the military screening was apparently very low.

Q Did you review a Florida Department of Corrections psychological screening report dated December 23rd, '68?

A Yes.

Q What did you learn from that?

A Again, in that Department of Corrections, when they were checking out Mr. Hall in that reception at Department of Corrections, they describe his intelligence as inferior. They noted a reading level of 2.6. He was 24 years old at the time. And there is other commentary that's, you know, characterizing Mr. Hall, con-

sistent with the other records that I was [225] reviewing. Would you like me to read the commentary?

Q Yes, if you would.

A It says, This individual shows characteristics of cultural, social, economic effectual and intellectual deprivation. He seems to be very inadequate and seems to lack the ability to adequately cope with the more complex factors of his environment. He seems also to lack the capacity to reason through to logical conclusion—conclusions, problems of day-to-day living, thus having a tendency to act out rather than to come to logical conclusions.

Generally speaking, this individual does not seem to show any gross psychopathology; however, he does show characteristics which indicate a very inadequate personality and an individual who is almost a stariodopy (phonetic)—and that's [sic]—which you would expect to come from a culturally inadequate environment.

Q Was there a DOC confidential evaluation dated September 13, '78, in your records that you reviewed also?

A September 13th, yes.

Q And what did you learn from that?

A Again, it's a characterization—again, this is '78 now. This is his second prison admission. Subject's prison record appeared fair, showing little [226] signs of self-improvement. Subject's intelligence quotient would be considered borderline retardation in intellectual ability.

Q Now, there was a Kent administered, a Kent. I guess, what is that?

A Kent is an older I.Q. measure. I have never administered the Kent. It's, again, one that's kind of more of a screening device than an in-depth I.Q. measure. But a Kent was administered to Mr. Hall while he was in the Department of Corrections and the Kent I.Q. in 1979 was a 79.

Q Is that comparable to Wechsler or WAIS or any of those, in any way?

A I mean, it's not really a measure that should be used in determining mental retardation. Basically, it's just a screening device that people use to try to classify an individual into certain groups that would be appropriate based on an estimate of his intelligence.

Q Is there reference to a 68 I.Q. on a DOC document dated August 22nd, 1969, within those records?

A There is a vocational report dated August of 1969. And it says—let me see if I can find it here. It says, I am doubtful we'll—we will be able to be of a great deal of help to this man—and then it says [227] I.Q. 68—but we'll certainly try.

Q Now, you reviewed both the resentencing transcript and post-conviction evidentiary hearing information in this case—

A Yes.

Q —at some point?

A Right.

Q How does mental retardation normally manifest itself?

A How does it normally manifest itself?

Q Yes.

A It can manifest itself in a number of different ways, but prenatally or when somebody is born, if they are exposed to anything that can create damage to the brain, that's a common etiology. When somebody is born, for example, when they suffer oxygen deprivation for some reason, the umbilical cord is wrapped around the neck, that can cause brain damage that can subsequently lead to mental retardation.

You can also have cultural deprivation. During the developmental years, you are not exposed to things that would maximize their intellectual capacity and, you know, they are not exposed to things that will stimulate and help them to intellectually grow. So there are many factors that can play into it, but a lot [228] of times it occurs prenatally and at the time of birth.

Q Is it something you would see in an individual's behavior? Would you note it that way first?

A Ordinarily, yes, you would. You would notice, because individuals with cognitive limitations and it's a developmental disability, usually there is a delay in their development. For example, there is a standard period of time when young children begin to walk, begin to babble, begin to potty train. Those are developmental milestones. So when you have an intellectually disabled child, generally, those things are slow. They are not able to demonstrate talking behavior and walking behavior, when normal children are able to demonstrate it.

Q In reviewing the records, you reviewed the prior testing and the various evaluations that were done in this case. Did you review a report from Dr. Krop?

A Yes.

Q That was a psychological report dated January 8th of '91?

A Correct.

Q Did you also review the testimony that he provided in this case?

A Yes.

[229]

Q What did you learn from that review?

A Dr. Krop was also—kind of did a full-scale analysis of Mr. Hall's functioning and assessed him as to the issue of mental retardation. He did the evaluation in 1990, when Mr. Hall was 44 years old. He did administer an intellectual testing utilizing the Wechsler Adult Intelligence Scale-Revised Edition and reported a verbal score of 70, a performance score of 79, and full-scale score of 73. So Dr. Krop, in his analysis, indicated that he felt Mr. Hall was functionally retarded, was not able to adapt very well, because of his cognitive limitations.

Q Did Dr. Krop do an informal address as to the adaptive, or was it just I.Q. testing? I just want to leave it at that.

A I don't remember him doing a formal analysis of adaptive behavior. But he did speak to other members of Mr. Hall's family and characterized, like I did, what his family related, essentially that Mr. Hall has always had difficulty adapting, in a number of areas.

Q Now, after you reviewed all of the documentation in this case with regards to Mr. Hall's I.Q., as you testified, yourself, you administered an I.Q. test to Mr. Hall, correct?

A Right.

[230]

Q Now, once you concluded your testing—and I believe you have already reported your scores, but if you would remind me again what your scores are?

A My scores—

Q Your scores as to the I.Q. testing.

A My scores on the I.Q. test were a verbal I.Q. score of 74, a performance I.Q. score of 73, and a full-scale score of 71 on the Wechsler Adult Intelligence Scale-Third Edition.

Q What is the next step you took, and why is that?

A The next step I took was to contact family members. I contacted his sister Deana Rigsby and I contacted his brother James Hall. The reason I did that is because to that point, I still was—I felt I was unable to make a determination on the ultimate issue as to whether Mr. Hall was mentally retarded. My I.Q. at the time was a 71, right on the cusp between mental retardation and borderline I.Q. A lot of historical information saying that people have recognized that he has limitations since he's been in first grade and all of his growing-up years.

So I wanted to interview his family or some family members, primarily for the purpose of doing adaptive behavior testing. And I had to do it [231] retrospective, which meant I had to try to get his family to help characterize Mr. Hall's functioning before he was 18 years old. And I did that with his sister Ms. Rigsby.

Q You have had other cases where you have represented [sic] other death row defendants?

A I've evaluated them, yes.

Q You have evaluated other death row defendants?

A Right.

Q And there have been other cases where you have not done adaptive behavior, and just done an I.Q. test—

A That's correct.

Q —is that correct?

A Yes.

Q In this particular case, what was the difference? Why did you choose to go forward in this case?

A Well, for example, in the example I gave earlier, this actually happened: I assessed somebody recently for this same kind of proceeding, and he had a full-scale of 102, and that was the end of it. If somebody scores that high on the intellectual measure, you have answered the question about mental retardation. In that case, the answer was the person is not mentally [232] retarded; his I.Q. score was much too high.

In the case with Mr. Hall, the difference is you get a 71, and you have historical information that seems to all—most everything seems to be saying the same thing. And that is that this is a man who functions somewhere in that range, between 65 and 75, in terms of obtained I.Q. So what becomes a pivotal issue in a case like that, when you have got a person who's between 65 and 75, they are going to have marginal adaptive behavior. At the very best, it's going to be marginal just because they are cognitively very low.

Q Do you have an ethical obligation to go forward, or is it a requirement for you to go forward and evaluate the adaptive when this occurs?

A I would say it's a little bit of both. If you are going to do an appropriate assessment, you should go forward. But the issue has not been resolved in my mind, my professional—professionally, I have not resolved the issue of whether the person is mentally retarded at that point. So I proceed to do adaptive behavior testing. This is the important issue: If you have somebody who has a 69 I.Q., and you have somebody with a 71 I.Q.—you know, it's not like 70 is a magic number that says if you get a 71, you are smarter than that guy who is a 69 and you are not mentally retarded.

[233]

The issue is if you have significantly subaverage intellect, right around 70, do those deficits contribute to adaptive inefficiency? That's the issue. It's two-pronged. It's two prong legally; it's two prong clinically. You have to assess when a person has an I.Q. of between 65 and 75, do those deficits create—do those cognitive limitations create deficits in the person's ability to adapt? That's how you will answer the question as to whether a person is mentally retarded with those individuals between 65 and 75.

So, it's necessary to do it, to answer the question. And it's—I mean, you are not doing a thorough evaluation if you don't.

Q In your opinion, Dr. Prichard, were you required to take that second step in order to be able to provide an opinion in this case and make a diagnosis in this case?

A Yes.

MS. RODRIGUEZ: Your Honor, at this point, the remainder of the information that I would elicit from this witness has to do with the adaptive functioning behavior. It's the second prong that Dr. Prichard evaluated. I don't want to violate the Court's order. If the Court wishes to put the remainder of this testimony on as a proffer and [234] consider it separately, then I would suggest that to the Court. But the adaptive functioning is the basis for the opinion and the diagnosis here. And I'm—it's necessary for me to put that on in order for this witness to be able to testify fully.

THE COURT: State want to add anything to the record on this matter?

MR. TATTI: Not in any large measure, your Honor. I've stated my position several times. And very clearly, my position is that once the witness testified that his I.Q. test of Mr. Hall revealed a full-scale I.Q. of 71, that the inquiry under Florida law is over. And that any adaptive functioning, whether it relates to prong two or prong three, is irrelevant at that point.

But for purposes of her record and proffering the matter, then she can—I don't have a problem with her continuing at this point.

THE COURT: In light of the ruling on the motion in limine and the previous rulings by the Court, I think that's the only way that I can consistently proceed. So I'm going to treat this as a proffer. I'm going to determine that through this witness, at least, you have not met the first prong, so that you are going to—this is all a [235] proffer as to the second and possibly the third prong. It should be noted for the record as a proffer.

MR. TATTI: And this is as to the second prong?

THE COURT: Second or—I don't know. Maybe he's going to talk about the third.

MS. RODRIGUEZ: Your Honor, we've presented evidence as to the third prong already.

THE COURT: I'm not trying to get you to be redundant or cumulative.

MR. TATTI: I just need to know what to object to.

THE COURT: It's proper at this point, because you don't get to any of—any how ...

Based on the motion in limine, you could not get to the second or third prong properly until you have met the first prong.

MS. RODRIGUEZ: Your Honor, the—I understand the Court's ruling. There is an overlap between the second and the third prong. And the witness's testimony is such that the first thing he did was look at the third prong. So I want to make clear on the record that I'm trying to follow the Court's motion in limine.

[236]

THE COURT: I appreciate that. This is a proffer. You may proceed with the proffer.

MS. RODRIGUEZ: Thank you, your Honor.

BY MS. RODRIGUEZ:

Q Dr. Prichard, you went further, I believe it was your testimony, to formally do an assessment of Mr. Hall?

A Correct.

Q Can you tell me what test you used to go forward with that assessment?

A I had to do adaptive behavior testing to assess his adaptive skills. And I had to do it retrospectively, which meant I had to identify with somebody who knew him well prior to the age of 18, a time frame where they could respond as a respondent to my questions about his skill level at that time. And I chose his sister Deana Rigsby because she seemed to know him the best, spent a lot of time with him. She was eight years older than him.

And we identified a period of time prior to the age of 18 when they were—it was the last year in 1960 that they lived in their mother's house. So she was able to kind of separate that from the rest of the history, because it stood out in her mind.

Q Now, just to make the record clear, is the [237] Vineland Adaptive Behavior Test one that's authorized by the Department of Children and Family Services in accordance with the rule for mental retardation, as far as the 3.203?

(Whereupon, Mr. Tatti stepped out.)

A Yes.

Q And that's the test that you undertook?

A Yes.

Q That test requires you to speak to an informant that knows the defendant?

A Right.

Q And basically, you asked a series of questions to the informant?

A Yes, I interview the informant and ask them about adaptive behavior in a number of different areas, communication, daily living, socialization. Primarily,

it's kind of a semi-structured interview. And you make sure that you ask enough questions to be able to score the instrument. And that's what I did with Ms. Rigsby.

Q You did find a reliable respondent?

A I thought she was reliable, yes.

Q And you questioned her with questions from the Vineland and I believe you indicated in your report you used a reference age of 15?

A I actually used the reference age of 14 to 14, [238] 3, which is pre-18. She was able to identify a time in 1960, when Mr. Hall would have been 15. I dropped back and used the age of 14 to 14, 3 in the Vineland to be a little more conservative in terms of trying to assess his adaptive skills. In other words, we were comparing him when he was about 15, we were comparing him with probably 14-year-olds.

Q So basically, the two-prong evaluation at the same time as you were going back to pre-18, as well?

A Right.

Q Now, what were the results of the information you got from this informant?

A Well, according to the characterization by Ms. Rigsby, he got a communication score of 39.

(Whereupon Mr. Tatti returned.)

Which is the same mean of 100, standard deviation of 15, daily living score of 48, socialization score of 52 and a composite score of 43. Which doctor—the one we referenced with Dr. Mosman was a composite score of 51, which was three standard deviations below the mean, and this would have been four standard deviations below the mean.

Q What does an adaptive skill function score mean between 33 and 53? What's that?

A What does it mean between 33 and 53? It means [239] that the person has significant adaptive deficits, as characterized by the respondent.

Q And has his score—his composite deficits score was 43?

A Yes, ma'am.

Q And with what level of confidence can you state that opinion?

A Just like with an I.Q. measure, you have a composite score of 43, that's an estimate. So you construct the confidence interval around that obtained score, and the confidence interval is 33 to 53. So, with 95 percent confidence, you can state that the person's true adaptive composite is somewhere between 33 and 53. That range, obviously, is in the mentally deficient range. It's demonstrating adaptive deficits in virtually every domain measured.

Q Did you speak to another informant—

A I did—

Q —or was this the only person you spoke with?

A I spoke also with a brother James Hall.

Q And what was the results you obtained following your questioning of Mr. Hall?

A According to the characterization by James Hall, he had—communication score was 25, daily living was 60, socialization was 43, with an adaptive behavior [240] of 39. That estimate with the 95 percent confidence interval between 31 and 47—in generally the same range as his sister indicated.

Q You found the two—the data consistent between the two informants?

A The data was consistent between the two informants. The characterization was also consistent with respect to affidavits, transcribed testimony from both James Hall and Deana Rigsby in 1988. So it was consistent with the information they provided at that time, too.

Q And the process that you used for measuring the adaptive behavior is consistent with what is used in your profession?

A Yes.

Q Okay. And as a result of both of these interviews that you conducted, did you reach an opinion with regard to Mr. Halls' adaptive behavior and function, if you will?

A Again, I felt that that formal assessment of it with his family obviously demonstrated consistent adaptive deficits across all domains measured. I felt that their characterization of his history was consistent with most everything I reviewed in the records in terms of recognizing that he had—he had [241] difficulties with his adaptation since grade school.

Q Having assessed his I.Q. and having then looked at the objective testing for adaptive behavior, did you—you also looked at a number of documents that were in the file because they were—due to extensive testing and different proceedings, correct?

A Right.

Q And was one of those an assessment from Dr. Barbara Bard?

A Yes.

Q That was September 8, '86, which is referred to in your report?

A Yes.

Q What did you learn, if anything, from that?

A Um.

Q That would bear upon the adaptive functioning question?

A If you are looking at that in my report, would you point me to the page, please?

Q Certainly. I'm looking at the list of witnesses that you have listed.

A I've got it. Page 9. Okay. Dr. Bard, this was in 1986. Mr. Hall was 41. She really talks about—she did psychoeducational testing with him. And the psychoeducational testing was the [242] Woodcock-Johnson. That's a more extensive psychoeducational evaluation. And said that he was between 0 and 4.7 on every task except one, where his grade level was something like a six or seven. But characterized Mr. Hall as basically an illiterate adult. Didn't have many mathematical abilities. She said he's probably incapable of even the most basic living skills which incorporate math and reading, such as writing a check, keeping a checking account. She also commented on his speech as being incomprehensible and difficult to follow. His communication skills were not very good.

Q Are those the type of behaviors that you look for when assessing adaptive behavior deficits?

A Right. And I'm not going to score that. It should be understood that that's not information that I'm going to use to score an adaptive instrument. But it is consistent with the way he was characterized by

his family. So it is a separate piece of information that's consistent with the characterization by his family.

Q Moving on to an evaluation that you reviewed from Dr. Dorothy Otnow Lewis dated September 10th of 1986.

A Right.

Q There was some information there relative to [243] adaptive behavior that was beneficial to you?

(Whereupon, Ms. Ahmed stepped out.)

A She called him—she felt he was brain damaged. She called him a chronically psychotic brain-damaged individual with severe learning disabilities, difficulty with speech, receptive language was poor. So, again, consistent with what was noted by other professionals, what was characterized by his family.

Q And you found similar information to support your adaptive functioning diagnosis as to deficits from Dr. Jonathan Pincus, a report dated August 22nd, '88, or—sorry, the neurological examination.

A Right, by Dr. Pincus in '88, when Mr. Hall was 43—indicated that Mr. Hall showed evidence of poor memory and probable mental retardation, and that he suspected Mr. Hall was mildly retarded and brain damaged.

Q And there was a report, psychological evaluation, dated August 22nd, '88, from a Dr. Jethro Toomer that talked about some speech impediments. My question is would those types of evaluations or comments from his report bear as to the adaptive deficits?

A Well, yes, in that it's consistent. And that's really what I'm looking for when I'm evaluating [244] all these past assessment results, is there consistency in

the way that Mr. Hall is characterized by other people who have evaluated or talked to him, or whatever. And this is representative of a consistency with respect to how his family was characterizing him, how the school characterized him, how the prison characterized him. So yes, there is a lot of consistency in the reporting.

Q And speaking about that consistency, there were a number of observations, if you will, made by Dr. Toomer—

(Whereupon, Ms. Ahmed returned.)

—as to the issue of Mr. Hall's mental retardation. And basically, did Mr. Dr. Toomer, in his report, find that he was achieving poor in school?

MR. TATTI: Judge, it has been for some time, but this is extremely leading at this point. She's reading from another report and then—or from Dr. Prichard's report, and then asking him to confirm—she's testifying.

MS. RODRIGUEZ: I can rephrase, your Honor.

THE COURT: Please rephrase.

BY MS. RODRIGUEZ:

Q Dr. Toomer in his report comments as to Mr. Hall's performance. Was that significant to you in terms of the adaptive function?

[245]

A It was essentially confirmatory in the sense that everything was saying that he functioned poorly in school. I didn't see any place that said Mr. Hall did pretty well in school. Everything was saying poor functioning in school.

Q Did that report indicate whether or not he had assessed him for both intellectual and personality functioning?

A Dr. Toomer's?

Q Yes.

A He commented about—I don't—Dr. Toomer said that verbal reasoning, Wechsler Adult Intelligence Scale was largely concretistic (phonetic) and inadequate. But doesn't report any scores that I saw.

But, I mean, Dr. Toomer's ultimate opinion was that he has—Mr. Hall has mental and emotional disturbance, severe impairment in cognitive functioning, and organic brain damage.

Q Did the report indicate these conditions to be of recent nature?

A No. It was long-standing, lifelong.

Q Was there anything in Dr. Toomer's evaluation or any other expert that would speak as to Mr. Hall's ability to—his mental functioning in terms of being easily influenced?

[246]

A Well, I mean, that's one way that Dr. Toomer also described Mr. Hall as being easily influenced. It's consistent with the way his family characterized him.

Q Is that something consistent with low deficits in adaptive behavior, being easily influenced?

A Yes. I mean, mentally retarded individuals, even individuals that are borderline I.Q. you know, they are not average, they are more gullible, more easily led, more easily taken advantage of and, because of that, more vulnerable. That characterization, you don't

usually make that characterization for people who are above average or average intellectually. It's usually a characterization that's consistent for the folks who are mentally retarded or borderline, right on the cusp. Definitely for the people who are mildly to moderately mentally retarded.

MS. RODRIGUEZ: Your Honor, I need to go back on the record. This is the end of the proffer with regard to the adaptive behavior. And I need to go back on the record for the purpose of confirming with the witness that he wrote a report in this case and that he give an opinion in this case and what that opinion was based on, and that would be the end of the testimony, your Honor.

[247]

MR. TATTI: Well, my understanding was that proffer was to the second prong of the retardation.

THE COURT: Second and third possibly.

MR. TATTI: Well, my position is that absolutely no testimony was adduced as to Mr. Hall's contemporaneous level of adaptive functioning contemporaneous with the actual psychological testing which established his I.Q. score. That is what the law requires. The 18 and before is the third prong. But both the DSM and Florida law require a significantly subaverage general intelligence level existing with deficits in adaptive functioning. And there has been not one word in this proffer about the level of Mr. Hall's adaptive functioning at the time that Dr. Prichard administered his test on August the 15th of 2002. Not one word.

Everything has related back to the time when Mr. Hall was a teenager and a young adult, around the time of his first incarceration, which was in the late '60s. So, while we're on the proffer, I would submit that no evi-

dence has been adduced to establish the second prong of the relevant test in the rule or the Statute 921.137.

THE COURT: Are you waiting—I didn't know [248] if you wanted to respond or not.

MS. RODRIGUEZ: Your Honor, I'm trying to comply with the motion in limine, and it's a very difficult situation here that I've been placed in. I could easily—you know, have put on evidence through this witness. But I'm in a proffer situation/I'm not in a proffer situation. So, you know, that's my dilemma, your Honor. I apologize, but that's exactly where I'm at.

THE COURT: Well, in light of the motion in limine, I think you just need to remain under the proffer and finish your testimony through this witness. The testimony—there is—through this witness, there is no testimony as to an I.Q. 70 or under, which makes everything that follows part of the motion in limine suspect.

MS. RODRIGUEZ: Yes, your Honor.

THE COURT: The second prong is challenged in the second part of the state's motion in limine, where they discuss both the case law and the rule require general—subaverage general intellectual functioning existing concurrently with deficits—with deficits in adaptive behavior. And there hasn't been any—I agree, I did not hear it. If there was, I missed it. I didn't hear any from [249] this witness on that point.

So I think where you are is there is some legal inadequacies with the testimony of this witness and you best—if you want to go forward with this kind of testimony, you are stuck doing the proffer.

MS. RODRIGUEZ: Your Honor, this Court determined that a retrospective evaluation is prohibited by law.

THE COURT: No, no. I'm saying the third prong, that's probably about the only way you are going to do it, if the person is already over 18 is to do it historically. But it's the second prong—there is a case, I think it's *Phillips*, that says we've—I'm reading Page 511 of *Phillips v. State*, which is found at 984 So.2d 503: We found that both the statute and the rule require significantly subaverage general intellectual functioning to exist concurrently. And they highlight "concurrently."

MS. RODRIGUEZ: Your Honor, I believe *Phillips*—

THE COURT: Just a second—with deficits in adaptive behavior.

MS. RODRIGUEZ: Your Honor, I believe the [250] reading of *Phillips* is not to do away with retrospective applications.

THE COURT: Not as to the third prong.

MS. RODRIGUEZ: *Phillips* doesn't say that, your Honor, that it's limited to the third prong. I'm suggesting to the Court that you can do—you have to have both. You have to have the retrospective and you do have to have evidence of current, but this Court's ruling in terms of the motion in limine was as to adaptive evidence—evidence as to adaptive behavior. So that's why I felt constrained with regards to this witness's testimony.

This particular witness—it's my position that this witness is able to assess Mr. Hall using a retrospective application. And he can do it today. What happened in *Phillips* is they wanted to do only one and suggest that the retrospective application was it.

Dr. Prichard has done both. He's seen the man now. He's looked at the man now. He's talked to the relatives

now. He's done an assessment of his relatives now. So he would be getting information from the past and how he was because he has to establish the third prong. But we're attempting to [251] use this as a current evaluation. There is no requirement that he have two.

And I guess that's the dilemma, because it's the same evaluation. There is not a separate evaluation, your Honor, that we've done. There has only been one, that's the Vineland, done by this expert. And it's his testimony that Mr. Hall is mentally retarded. I'm suggesting to the Court there is no Supreme Court ruling that says he cannot undertake this evaluation and offer this testimony. I'm suggesting to the Court that *Phillips* says you can't rely solely on one factor. He's tested him now. His test result is now.

Now, the Court can look at the weight of the evidence, and the Court can certainly come to a different conclusion in terms of what we've offered for evidence. But I'm suggesting to the Court that we're permitted to put that evidence on and then the Court can make a determination.

THE COURT: State?

MR. TATTI: Judge, perhaps the point I was attempting to make got lost in there somewhere. If we assume the Court made no pretrial ruling. The law requires that the defendant by clear and convincing evidence to establish three things, and [252] they are joined by the word "and." The first of those is that his I.Q. is 70 or below. I submit the testimony thus far from this witness, based on his evaluation, fails to meet that first prong. After the "and" comes contemporaneous deficits in adaptive functioning.

THE COURT: Concurrent.

MR. TATTI: Concurrent. The relevant community to assess, I submit, would be the Department of Corrections, because, factually, this defendant has been incarcerated in the Department of Corrections since February of 1978. There has been no testimony, for instance, that Dr. Prichard interviewed corrections officers or classification officers or reviewed records of how Mr. Hall functions in his present community. He's testified that he interviewed the family members for the purpose of establishing the level of his functioning at age 18. He jumped right to the third prong. But there has been no evidence at all as to the second prong.

And I submit, notwithstanding the motion in limine of the three prongs, the only evidence adduced by this witness goes to the last prong. He fails on the third prong, the I.Q. level. There [253] has been no testimony at all about his adaptive functioning at the time of the test, which is what is relevant under the Florida law. And I submit that's what's relevant under the DSM. So regardless of what hat we're wearing, I think we have an issue with even a diagnosis of mental retardation, much less a legal finding of it.

THE COURT: I'm certainly not going to go anywhere near the DSM. That's way beyond my field, and I won't even attempt to tell you what that means or says or requires. But legally, I think we all know what the rule and the statute call for. Three prongs all have to be met, all have to be met by clear and convincing evidence. The burden is on the defense. You don't meet any one of them, you fail. All three have to be met.

Now, through this witness, as testified, based on my recollection, we don't—through this witness alone, we don't meet prong one. We have not met prong two yet. Prong three, arguably, there is evidence.

So, I don't know what you are asking me. I don't know where you are trying to go. But I think based on the motion in limine filed yesterday, you know, you fail on the first two prongs. So, if you [254] want more information from this witness, you should do it as a proffer, because you can't meet the prongs and, therefore, technically, it should—should be ended at that point.

But I'm going to allow you to proffer it. So if you want to proffer, proffer away. But I think it needs to be under the proffer unless you have something that we have not heard that would change the Court's ruling.

MS. RODRIGUEZ: Well, your Honor, now I'm totally confused. Because when the—when this witness took this case to evaluate this defendant, he did so as a clinician, not a lawyer and not with *Cherry*.

THE COURT: I understand that.

MS. RODRIGUEZ: But that's a dilemma, your Honor. Because today, Cherry is being applied to his evaluation. And he was consulted and wrote a report in 2003. So I guess my dilemma is that he conducted an evaluation, and that evaluation was based on a retrospective evaluation of his adaptive skills. And the DSM allows him to do this. This is the problem that I'm having, your Honor. If the Court wishes me, I will put it in as a proffer and continue and asking him the questions.

[255]

THE COURT: That's what you need to do. Again, I'm not telling you—all I'm telling you is my understanding of the law. And I think the law is pretty straightforward, and I think we all understand what the law is. It's your job to meet the requirements of the law. If you cannot do it through this witness, then,

you know, that's an issue—we'll figure out what it means some other day.

But for right now, based on the objection of the state, based on the motion in limine raised yesterday, unless ever you have something new that we have not heard that would change my mind, you need to finish up your proffer and get whatever you want from this witness in the form of the proffer—

MS. RODRIGUEZ: I will.

THE COURT: —within the confines of the proffer.

MS. RODRIGUEZ: Well, your Honor, I wanted to get the opinion of the witness on the record is my dilemma.

THE COURT: You can do that as a proffer.

MS. RODRIGUEZ: I suppose I can, but there is a difference between the evidence in a proffer and [256] the evidence in the record. So that's why I was wanting just the opinion, your Honor.

THE COURT: Well, based on the evidence presented to this point, through this witness only, we're only talking about this witness, you can't meet prong one, and you have not met prong two. So prong three, you have provided some evidence on. That's where I see it, at this point, through this witness alone.

So again, this is at least the third time I've said it. I will say it one more time: Based on the proffer, based on the state's—excuse me, based on the motion in limine, based on the state's objection, the way to finish with this witness if you want to get more testimony from this witness along the lines that I think you want, you need to do it within the confines of a proffer.

MS. RODRIGUEZ: I will, your Honor.

THE COURT: Thank you. We're continuing in the proffer.

BY MS. RODRIGUEZ:

Q Dr. Prichard, you were retained by CCRC to do an evaluation of Mr. Hall?

A Yes, ma'am.

Q That evaluation was for the purposes of mental [257] retardation?

A Yes, ma'am.

Q And in order to do that evaluation for the purposes of doing it for mental retardation, you are required to get an intelligence test?

A Correct.

Q And you administered an intelligence test to the defendant, Mr. Hall?

A Yes.

Q And, I believe, you have already testified with regards to the results of those tests, but if you would once more tell the Court, please, the results of those tests, just the scores, please?

A Verbal I.Q. 74, performance I.Q. 73, and full-scale I.Q. score of 71.

Q Based upon your experience, which is detailed in the record, you felt it was necessary for you to go forward with the evaluation of his adaptive behavior?

A Yes.

Q And having done an assessment of his adaptive behavior, was that assessment done using instruments that are recognized by your profession as well as Florida law?

A Yes.

Q And the result of those evaluations were that [258] there were deficits?

A Yes, deficits in adaptive skills consistent with measured I.Q., basically consistent with mental retardation.

Q And having said that, you evaluated both the intelligence and the adaptive and went further to look for evidence in this record with regards to the third prong of the mental retardation criteria, being prior to age 18?

A Yes, ma'am.

Q Not necessarily in that order, correct?

A Correct.

Q And having done that, you reached a conclusion in this case with regards to the facts as you see them and the diagnosis in this case?

A Yes.

Q And could you state with a medical degree of certainty or psychological degree of certainty what that opinion is?

A Right. All the records that I reviewed, and I reviewed a bunch of records, and the testing that I performed, the test scorings that I reviewed, I felt like the evidence for my purposes in performing clinical evaluation, was that Mr. Hall did meet the three prongs required for a diagnosis of mild mental retardation.

[259]

Q Based on your experience and knowledge in working with mental retardation patients, and in eval-

uations done with regard to death row inmates, did you find that that mental retardation diagnosis is consistent with Florida 3.203?

A Um.

Q Let me try to brief that up. A couple more questions, I'm sorry. Let me—

MS. RODRIGUEZ: Your Honor, if I could rephrase, please?

THE COURT: You may rephrase.

MS. RODRIGUEZ: Thank you, your Honor.

BY MS. RODRIGUEZ:

Q You have testified in these proceedings prior—

A Yes.

Q —in other 3.203 proceedings?

A Yes.

Q And you have conducted other evaluations, if you will, with other defendants?

A Yes.

Q And you have assessed both their I.Q. and their adaptive behavior?

A Yes.

Q And you have used the Vineland as an [260] instrument to do that with?

A Yes.

Q And the Vineland requires the assessments to be done using informalities, as you did with in this case?

A Yes, respondents familiar with the person, yes.

Q And there is nothing about your evaluation in this particular case that is different or unique in any way from others that you have undertaken, in your history?

A Well, no, in the sense that I always talk to family, if family is available, that knew about the person prior to the age of 18. I have done adaptive behavior testing with prison guards before, current adaptive testing. I didn't do it in this case. I don't really know why I didn't do it. It's been seven years. I'm not sure if Mr. Pinkard said no, or what. But I did not interview a Department of Corrections person.

What I did was I talked to sister about pre-18. I talked to sister—did adaptive behavior testing with sister. In Mr. Hall's adulthood, prior to coming to prison, and Mr. Hall's brother in adulthood, prior to coming to prison.

Q And you wrote a report with regards to this [261] case?

A Yes.

Q And in that report, you have indicated that it is your opinion that on the issue of mental retardation, that Mr. Hall has some deficiencies?

A My opinion is that he would qualify for a diagnosis of mild mental retardation.

MS. RODRIGUEZ: Your Honor, that concludes my questions of the witness. I simply wish at this time to admit in the record the report itself that Dr. Prichard has been referring to. And we have removed the information from the—Mosman and made that separate so that we can mark that with the clerk.

THE COURT: That would be marked for ID but not admitted. The other part as I understand it the

state—I don't want to speak for the state. What's the state's position on the other part?

MR. TATTI: Judge, the only problem with Dr. Prichard's report, although the idea of admitting his report after he spent the last two hours testifying about his report, I submit is superfluous at this point, and hearsay, but we can have that debate later. His report includes a reference to Dr. Mosman's materials. So, to the [262] extent that his report makes reference to that matter, I object.

However, I understand there is no way to excise that and admit his report. As long as that is admitted over my objection, to that part that references Dr. Mosman's testing. But I can't—it can't be excised.

THE COURT: I don't know any way to excise it. Are you—do you object to the report coming in? I mean just generally?

MR. NUNNELLEY: Can we have just a minute, Judge?

THE COURT: Yes.

MR. TATTI: Judge, Mr. Nunnelley points out—

MR. NUNNELLEY: Do you want me to do it?

MR. TATTI: That's okay. I can repeat what you said. Mr. Nunnelley correctly points out that Dr. Prichard was able, during the course of his testimony, to elaborate and explain as to the extent to which he relied on Dr. Mosman's findings in arriving at his own. His written report is completely bereft of any written explanation in that regard. For that reason, I would object to its admission. There is no way to separate out—I mean, he's done it with his testimony. There is [263] nothing in his report virtually that has not been

testified to, if not read by counsel to Dr. Prichard. So I would object to the admission of the written report.

THE COURT: I will sustain that objection. I think that the report should be marked. It should be listed with the records as offered but not admitted. I think in addition to the hearsay problem, hearsay within the hearsay that you have complained about, there is the problem of it being cumulative and redundant. And, you know, after we spent the morning allowing the witness to testify, to then put back in his record, just seems redundant and cumulative and overkill. So, I—I'm going to sustain the objection in that regard, as to the report.

MS. RODRIGUEZ: Your Honor, just so the record is clear, I want to make clear that the early data of the report with regards to the notice on the—the report is important from the defense standpoint in terms of notice to the state as to all of the testimony involving Dr. Mosman. And having said that, we wanted to have it be part of the record—

THE COURT: It can be part of the record in the capacity of being offered but not admitted. So [264] it can be marked. It can be handed to the clerk. And my understanding is they have a separate portion of offered but not admitted.

MS. RODRIGUEZ: I understand, your Honor. I just want to register my objection to it not being part of the record.

THE COURT: Understood. Being admitted is what you mean, because it will be part of the record.

MS. RODRIGUEZ: Yes, sir, I apologize.

THE COURT: Very good. Noted. The Court's ruling is the same.

THE CLERK: Your Honor, what about the other material?

THE COURT: Other material? Yes, are you are offering that?

MS. RODRIGUEZ: That was already offered.

THE CLERK: It was offered but I don't think it—

THE COURT: It was offered, but I'm not sure it was actually admitted.

MS. RODRIGUEZ: We were trying to redact—the state said they had no objection if we took out the report of Dr. Mosman.

THE COURT: Right.

[265]

MS. RODRIGUEZ: So I had my assistant take out the report. And now the state has an objection to the report itself.

THE COURT: You want to take out Dr. Mosman's material and offer that separately, which would be denied, but it will be part of the record.

MR. TATTI: She's just saying you have not formally—

THE CLERK: We need to formally—

THE COURT: Now I think you have everything else, you pulled aside Dr. Pinkard's [sic] report, we pulled aside the information that was in that report?

THE CLERK: Yes, your Honor.

THE COURT: Once we have pulled Dr. Pinkard's report out—we have done that. So then the rest, you are offering, does the state have an objection?

MR. TATTI: Yes.

(Defendant's Exhibit 5 received in evidence.)

THE COURT: The bulk of the other material relied upon by Dr. Prichard will be in evidence as state's?

THE CLERK: 5. Defendant's 5.

THE COURT: As what?

THE CLERK: Defendant's 5.

[266]

THE COURT: Now, does the state have any questions and Cross-Examination?

MR. TATTI: Yes, sir.

THE COURT: Now, in all fairness to everybody, you need to—before you start asking questions, figure out are you asking these questions as part of your response to the proffer? Or are you asking these questions open-ended? Because it makes a huge difference, I think, based on the way this trial is proceeding.

MR. TATTI: Frankly, Judge, based on the way the hearing has proceeded, it is kind of impossible for me to sort out.

THE COURT: So long as you announce what you are doing it as, I will honor that. But I'm warning you that if you ask open-ended questions, you could cause—you know.

MR. TATTI: You know me. I won't do that.

THE COURT: What are you going to do? What do you want to do?

MR. TATTI: My intention is to begin my Cross-Examination with some questions relating to Dr. Prichard's approach to his evaluation of Mr. Hall as a

clinician and conclude my Cross-Examination with some questions to [267] Dr. Prichard from the perspective of the legal requirements, which I am fairly certainly Dr. Prichard is aware of, as he was a participant in the *Cherry* case.

THE COURT: Again, I am treating these as open-ended questions not restricted to the proffer.

MR. TATTI: That's fine. May it please the Court?

THE COURT: Absolutely.

CROSS-EXAMINATION

BY MR. TATTI:

Q Good afternoon, Dr. Prichard.

A Hello, sir.

Q Let's start and establish one ground rule here. Do you recognize that there is a difference between the definition of mental retardation that appears in the DSM-IV-TR, versus the legal definition of mental retardation under Florida Statute 921.137 and in Rule of Procedure 3.203?

A Yes.

Q And you are aware of the difference?

A Yes.

Q All right. From a clinician's perspective, and if I understood your testimony, when you received this report, you were asked to do a confidential [268] evaluation of Mr. Hall; is that correct?

A That's the way I recall it, yes.

Q That's in fact how you titled your report.

A Yes.

Q And you approached that report as a clinician; is that correct?

A That's correct.

Q So you did what a clinician is supposed to do?

A In my opinion, yes.

Q Okay. Now, did I understand you that you received no material that included I.Q. scores, I.Q. testing from Mr. Hall as a child from his school age years? You got some general comments, but no I.Q. testing; is that correct?

A That's correct.

Q In fact, the first I.Q. test that you came across in the material you found was a beta I.Q. test administered by the Department of Corrections to Mr. Hall in December of 1968; is that correct?

A That's correct.

Q Okay. Now, you used the phrase "state-of-the-art" to describe the Wechsler test, the WAIS?

A Um-hmm.

Q The beta is not the state-of-the-art; is that [269] correct?

A That's correct.

Q But it's out there?

A Yes, it's out there. It's used primarily in institutions, like Department of Corrections. It's a down-and-dirty measure where you can administer intellectual testing to a lot of people at once. It's group administered, so you can get kind of an idea of people's I.Q.s, a general idea.

Q It wouldn't be appropriate for a clinician practicing today to administer such a test?

A Not to administer it for purposes of determining whether a person is mentally retarded.

Q Fair enough. That beta test has undergone revisions over the years; is that correct?

A That's correct, yes.

Q And what started in the '30s as a beta test has now come to a Beta III; is that correct?

A That's correct, yes.

Q With an attempt each time it's revised to make it better, to make it more relevant to a clinician; is that correct?

A Just keep updated with—just like the regular intelligence tests, like the Wechsler scales, to keep it updated in terms of cultural and social issues, [270] to make it more valid and more reliable. That's the effort anyway.

Q That test administered to Mr. Hall which appeared in the prison records that you reviewed—

A Right.

Q —is dated December 23rd, 1968, showed a beta I.Q. score of 76; is that correct?

A That's correct.

Q And then the next I.Q. test that you found in the material you were provided by CCRC was a reference in February of 1969 from a Department of Corrections educational counselor's report that Mr. Hall had an I.Q. of 76, but it didn't refer to the instrument by which that test, that score, was derived; is that correct?

A That's correct.

Q So you got December '68, February '69, same score, 76?

A Correct.

Q Then you made reference on Direct Examination, during the proffer, to a notation in a vocational report at an I.Q. of 68?

A Correct.

Q Isn't it true that that reference is in parentheses and it literally says in parentheses, 68, comma, E-T-C?

[271]

A Yes.

Q As in "et cetera"?

A Yes.

Q And you put that in quotes in your report?

A Correct.

Q But there is absolutely no reference to how that number was arrived at?

A That's correct.

Q It doesn't identify the testing instrument that was used—

A Correct.

Q —where it came from?

A No, the testing instrument is not identified, just I.Q. of 68.

Q So you have got 76, 76, this reference to a 68. And then in January of 1979, this Kent test that you referred to during Direct Examination on the proffer—

A Right.

Q —which revealed an I.Q. of 79; is that correct?

A That's correct.

Q Okay. Now, would you agree with the general statement that mental retardation is a static condition that generally shows little change over the course of an [272] individual's life?

A Yes.

Q You, in fact, wrote that in your report, didn't you?

A Well, if you say so. But, yes, I would agree with that statement.

Q It's one of the last sentences in your report.

A I don't argue with that. I agree with that statement, yes.

MR. TATTI: May I approach?

THE COURT: You may.

BY MR. TATTI:

Q The second-to-the-last paragraph?

A That's correct, I did write that.

Q Okay. You talked about Dr. Lewis?

A Um-hmm.

Q Correct?

A Correct.

Q Barbara Bard?

A Right.

Q Were you aware as to how Dr. Lewis came to evaluate Mr. Hall, the circumstances under which Dr. Lewis evaluated Mr. Hall?

A I can't recall. I don't think I knew the circumstances. Sitting here today, I don't know the [273] circumstances.

Q So you weren't aware that Dr. Lewis and a team of experts from N.Y.U. had arrived on Florida's death row for the purpose of doing research on the death penalty—

MS. RODRIGUEZ: Objection, your Honor, he's been asked and answered. He doesn't recall.

MR. TATTI: That's a matter of record in this case. Your Honor has heard the testimony.

THE COURT: But you are arguing facts that are not in evidence, and you are testifying. I will sustain the objection.

BY MR. TATTI:

Q So you don't know how it was that Dr. Lewis arrived to meet Mr. Hall?

A No.

Q Do you know whether or not Marilyn Feldman—whose report you reviewed; is that correct? You reviewed a report from Marilyn Feldman?

A Yes.

Q That included an I.Q. score from a test she administered on September 10th, 1986; is that right?

A That's correct.

Q Do you know whether Marilyn Feldman was part of Dr. Lewis' team?

[274]

A I don't know. The only reason I think she was and I think the only reason I know about this team thing that you are mentioning—it didn't interest me—was that Dr. Mosman referenced it, the team which included people like Ms. Feldman.

Q All right. Ms. Feldman administered a WAIS, a Wechsler Adult Intelligence Scale-Revised; is that correct?

A That's correct.

Q Which is, as you referred to it, the state-of-the-art at that time?

A Yes.

Q And the I.Q. score she obtained was 80; is that right?

A That's correct.

Q So between 1968 and 1986, Freddie Hall, on identifiable testing instruments, got I.Q. scores of 76, 79, and 80; is that right?

A Yes, on the three we mentioned, yes.

Q And based on what you said on Direct Examination about the standard error measurement, those are statistically, for the purposes of a clinician, identical scores, are they not? They are within the plus or minus four?

A See, the problem with that is it's probably [275] not the same scale when you are talking about a beta I.Q. and a Kent I.Q. They probably don't have the same standard of error on all the instruments. But, you know, the score reported on the beta, the Kent and the Wechsler, between 68 and 86, they are virtually identi-

cal scores, you know, if you eliminated the consideration of the beta and the Kent not really being scores that you should pay that much attention to.

Q Would you agree that the scores on the I.Q. testing administered to Mr. Hall dramatically changed after 1987, 1988?

A Ten-point difference or so, 11-point difference, I think is the worst case, you are referring to the high of 80 and then the low of Mosman, which was 69, and then me a 71 and I think a 73 and maybe a 74. Is that what you are referring to—

Q Yes, sir.

A —subsequently?

Yeah, I mean, is that substantially different? Statistically, I don't know. It's probably right on the cusp of being significant. I don't know. It's between 6 and 11 points. So, you know, probably some of those scores are substantially different and others aren't substantially different.

Q But you would agree there was a consistency in [276] the scores, the available I.Q. scores for Mr. Hall prior to '87, '88 versus the ones after '87, '88. There is a difference in those two sets of scores.

A Yes, sir. I would agree with that. This is the thing, though; this is the issue: You are talking about a Kent I.Q. and a beta I.Q. And you can't really fairly compare what somebody gets on those kinds of I.Q. measures relative to, say, the Wechsler—

Q Okay. Throw them out. How do you factor in that 80?

A It's a difficult one to factor in. It really is. It's an outlier when you compare it to all the other ones that came after that.

Q Do you have any idea what was going on with Mr. Hall's case in '87 and '88?

A I'm sure I did, when I was first doing it, just in terms of the chronology of what I was reading. But right now, sitting here, I don't know.

Q So you don't know what the legal significance or the legal activity going on with regard to Mr. Hall was at that time?

A Sitting here today, no, I don't.

Q And you don't know why Dr. Toomer or Dr. Pincus were sent to talk to Mr. Hall when they were sent to talk to Mr. Hall?

[277]

A Not really, no.

Q And you don't know whether they were introduced to Mr. Hall in the manner that you were introduced to Mr. Hall; is that correct?

A That's correct.

Q And you were introduced to Mr. Hall by Mr. Pinkard; is that correct?

A Yes, I was hired—you mean was I hired by?

Q Well, didn't he go to the prison with you and say, Mr. Hall, this is Dr. Prichard, he works for me, he's going to file a report that's confidential, that I'm going to use, and if it's something helpful, it might appear in court?

A I don't know if he did or not. I really can't recall.

Q Didn't you write that in your report?

A If I did, okay. I'm telling you I can't recall. It's been seven years. If Mr. Pinkard came with me, I don't recall that.

Q I'm referring to the second page of your report. The section entitled Notification of Confidentiality. Does that refresh your recollection?

A Yeah. I mean, in terms of—it does in terms of this being a confidential assessment, that it would be provided only to Eric Pinkard of CCRC. I don't know [278] that Mr. Pinkard was with me when I did the evaluation. I just don't remember that.

Q Okay. But somebody explained to Mr. Hall that you were working for his lawyer?

A I'm sure when I did the notification of confidentiality, I told him exactly what's reflected there, that I was hired by CCRC, his attorney.

Q All right. Now, after '87, '88, there are a series of scores that were included in the material that were given to you; is that correct?

A That's correct.

Q In fact, you have a score from Dr. Krop who administered a WAIS-R on—in March of 1990?

A That's correct.

Q That score being 73?

A Correct.

Q You have Dr. Mosman's score, which you testified to on the proffer, which was administered—that

test was administered in November of 2001; is that correct?

A That's correct.

Q And then you have your own testing which was completed I believe you said August 15th, 2002; is that correct?

A Correct.

[279]

Q And you got a 71?

A That's right.

Q Were you ever provided with an I.Q. at the time that was conducted on Mr. Hall after you completed your examination?

A I was—I was given a report or something from a Dr. Sesta that was administered after I assessed him.

Q And did you, in fact, get a whole test instrument, the raw data?

A Yes, it was recently. Probably within the last six months, I would say.

MR. TATTI: Your Honor, may I have this exhibit marked as State's Exhibit?

THE COURT: For ID?

MR. TATTI: Yes, sir, at this point.

(State's Exhibit A marked for identification.)

MR. TATTI: May I approach the witness?

THE COURT: State's—

MR. TATTI: This is State's Exhibit A for identification.

THE COURT: No, I mean is the defense aware of what you're—

MR. TATTI: I got it from her.

[280]

BY MR. TATTI:

Q I'm handing you what's been marked for identification as State's Exhibit A. Do you recognize that?

A Yes.

Q State's Exhibit A is the actual testing instrument, the raw data associated with the administration of a WAIS-IV, the newest version of the Wechsler test; is that correct?

A That's correct.

Q And that test—

MS. RODRIGUEZ: Just a moment. Just so the record is clear, your Honor, we did not provide that particular test. That was provided by Dr. Sesta directly to the state's expert, Dr. McClaren. So I'm not sure where all this is going. It's not listed in any way on any of our exhibit lists as far as—their exhibit list as far as something they were going to introduce today to the Court. We did provide it to their expert.

So I want to be sure that the record is clear that it was never in our possession. I don't have a copy of that document. So I would like a copy if that's going to be introduced by the state here.

MR. TATTI: That's fine.

[281]

THE COURT: I'm not aware of where they are going. I'm not aware of what the document is.

MR. TATTI: If he'd have told me he hadn't seen it, we wouldn't have gone any further than that. But when he acknowledged that he received a copy of it, I believe it is now relevant.

MS. RODRIGUEZ: It just was not part of our presentation nor in the record, your Honor. So the state is presenting this as new evidence in the case.

MR. TATTI: I will be happy to give her a copy.

MS. RODRIGUEZ: I just need a copy.

THE COURT: If that's your objection, as long as you are going to get a copy, I think we have resolved it. Go ahead.

BY MR. TATTI:

Q That is an I.Q. test, WAIS-IV, administered to Mr. Hall after the date of the testing you performed; is that correct?

A That's correct.

Q In fact, it was a test that was administered on November 25th, 2008, according—by its face; is that correct?

A That's correct.

[282]

Q And an I.Q. score was obtained as a result of that test, full-scale I.Q. score; is that correct?

A That's correct.

Q And it was 72; is that correct?

A Yes.

Q So, would it be fair to say that since '86, '87, the four—of the four known I.Q. tests that have been administered to Mr. Hall, only one of them is below 70?

A The obtained score, yes, that would have been Dr. Mosman with a 69.

Q Right. As you testified during the proffer, as a clinician, you are required to take into account an error measurement; is that right?

A That's correct.

Q So a 69, to you, as a clinician, can go as low as 65?

A Around there, yes.

Q And as high as 74?

A Right.

Q And to you, as a clinician, there is absolutely no difference among those scores because of the standard error measurement?

A Right. They are virtually identical. Four points separate the lowest at 69 from the highest at 73.

[283]

Q And that's the world you operate in as a clinician, right?

A Right.

Q Now, would you agree that at least in terms of the verbiage, the definition of mental retardation that appears in the DSM in its current—the DSM-IV-TR—

A Um-hmm.

Q —is extremely similar to the verbiage that appears in Florida Rule Criminal Procedure 3.203 and in Florida Statute 921.137?

A Yes.

Q There is now a little difference in how that definition is actually put into effect, would you agree with that?

A Yes.

Q But the words are almost identical?

A Right.

Q And the words in both the DSM and in the rule and in the statute require that you establish a significantly subaverage general level of intelligence; is that correct?

A That's correct.

Q With deficits in adaptive functioning—that's the second part, right?

A Correct.

[284]

Q —with an onset prior to age 18, that's the third part?

A That's right.

Q Would you agree that both the rule and the DSM require that to diagnose under the DSM as mentally retarded, deficits in adaptive functioning must be established concurrently with the I.Q. portion of the test?

A Yeah, that word is in there, "concurrent."

Q And your testimony was you did not address his current level of adaptive functioning; is that right?

A In 2002. That's correct, yes.

Q Okay. So would you agree that to diagnose Mr. Hall under the DSM as mentally retarded at the time you evaluated him, based on what you did was, perhaps, premature in the absence of any inquiry into his present, that is 2002, level of adaptive functioning?

A "Premature"? I don't know if I would characterize it as premature. I understand what you are saying. The problem becomes, you know, trying to assess adaptive behavior in the context of DOC. I don't know why it wasn't done in 2002. I really don't recall all that went on in this case. And I did most of my work at the end of 2002 on this case. I just don't remember what went on. But ...

[285]

Q But you acknowledge it wasn't done?

A It was not done in this case, and I'm not sure why.

Q Okay. All right. That's the clinician's issues?

A Right.

Q Now, I want to talk about legal issues. You were one of the experts appointed by the court in the *Cherry* case; is that correct?

A That's correct.

Q In fact, you were appointed by the Court on behalf of the State of Florida?

A That's correct.

Q Along with another clinician who was appointed for the defendant?

A That's correct.

Q Do you remember his name?

A Dr. Burston.

Q Right. And Dr. Burston administered an I.Q. test to Mr. Cherry; is that correct?

A That's correct.

Q And arrived at an I.Q. score of 72 on Mr. Cherry; is that correct?

A I believe that's right, yes.

Q And you relied on Dr. Burston's I.Q. testing [286] in reaching your conclusions; is that right?

A That's correct.

Q And you concluded, as you were appointed as a clinician, that Mr. Cherry was mentally retarded; is that correct?

A Right. I also did adaptive behavior testing and concluded based on the recent result of the intellectual measure in the adaptive behavior test—

Q But the relevant I.Q. score for Mr. Cherry was 72?

A That's correct.

Q That both you and Dr. Burston used in arriving at your diagnosis that Mr. Cherry was mentally retarded?

A That's correct.

Q And you know the result of the Cherry case, don't you, Dr. Prichard?

A Yes, I do.

Q And you are aware that the Florida Supreme Court, in no uncertain terms, interpreted that ruling and that statute to require that a defendant, in order to be found mentally retarded under Florida law—

MS. RODRIGUEZ: Objection, your Honor, as to the question calling for a legal opinion here.

MR. TATTI: He said he knows. I asked him if he knew.

[287]

THE COURT: Ask your question. Overruled.

BY MR. TATTI:

Q Are you aware that the Supreme Court now has made it very clear that, under the law, versus your world as a clinician, that an I.Q., in order to be considered mentally retarded under the law as it relates to the death penalty, that the I.Q. score has to be 70 or below?

A Yes, I am aware that's a bright-line cutoff.

Q And the Supreme Court doesn't care about standard error measure?

A Right.

Q They—legislature didn't write about it, so the Supreme Court wasn't interested in it?

A 70 or below. That's it.

Q All right. Would you agree, Dr. Prichard, that under the legal standard, which is what we're here about today, that Mr. Hall does not suffer from significantly subaverage intellectual function based on your revaluation of Mr. Hall?

A I mean, honestly, that's—what I think is up to the Court to decide, not me. I express it as a clinician, try to aid the Court in its decision.

Q But your I.Q. score was 71?

A My I.Q. score was 71, yes.

[288]

MR. TATTI: I don't have any more questions.

MS. RODRIGUEZ: I have nothing further, your Honor.

THE COURT: May this witness be excused?

MS. RODRIGUEZ: Yes, your Honor.

THE COURT: Thank you for coming in. You are free to go about your business. If you are under subpoena, you are released from that subpoena.

THE WITNESS: Thank you.

THE COURT: Has the state—let's go back to the defense. Has the defense rested?

MS. RODRIGUEZ: Yes, your Honor.

THE COURT: Defense rests.

Has the state determined whether they wish to call a witness or witnesses? This is the end.

MR. TATTI: We'll rely on the evidence that's been adduced at the hearing, your Honor.

THE COURT: So you have no witnesses you wish to call, nothing else you wish to present?

MR. TATTI: That's correct. I would offer State's Exhibit A into evidence on behalf of the state.

THE COURT: Now, that is the test of Dr. Sesta?

MR. TATTI: Yes, sir.

[289]

THE COURT: What says the defense?

MS. RODRIGUEZ: Your Honor—your Honor, we would object. We did not have this document. We did not have a chance to see the document. Um, we don't object to the testimony that's already in the record with regard to Dr. Sesta having done an evaluation or, you know, even the information that was put on record with regards to the document. But we have not seen the document, ourselves, to be able to deal with all of the information that may be in there. I don't know what's in there at all. So I feel compelled to keep the record clear.

THE COURT: In light of my previous ruling, I will sustain your objection and it will not come into evidence. So list it as offered, marked for ID, but not in evidence.

MS. RODRIGUEZ: And I would remind the state that we do want a copy, because it went expert to expert, and we never had our hands on it.

MR. TATTI: Well, my copy is now in the hands of the clerk, and I have not made any copies of it for concerns of the confidential nature of it—

THE COURT: How—

MR. TATTI: —my copy.

THE COURT: —how many pages is that [290] approximately?

THE CLERK: Quite a few.

MR. TATTI: 25 or 30, somewhere in that neighborhood.

THE COURT: The Court will volunteer its copier. Madam clerk, if you will at the break or sometime when we finish here, make a copy for the defense, please?

THE CLERK: Yes, sir.

MS. RODRIGUEZ: Thank you, your Honor. We appreciate that.

THE COURT: Now, state's rested. Defense rested. Now, do you want—how do we want to handle closings?

MS. RODRIGUEZ: Your Honor, we did prepare an order, if the Court will recall, we mentioned.

THE COURT: Yeah, it was mentioned yesterday.

MS. RODRIGUEZ: We sent a copy to the state. It was faxed to them on December 1st. I don't know their position with regard to any of the content of it. I think I checked with them at the beginning, and they had not offered an objection that I'm aware of. But I do have a proposed order.

MR. TATTI: Do you have another copy of it?

THE COURT: And I would like a copy of it to [291] see what it says. Maybe I have an objection, I don't know.

MS. RODRIGUEZ: That's true. Here.

MR. TATTI: Judge, my only response to this, I suppose—my objection is that signing this order would add one, two, three, four, five, six months to a matter that has been pending since 2005. I acknowledge lots of things have happened since 2005, many of which have been earned to my benefit. But prolonging this case to argue a point that I don't think requires a great deal of argument based on the evidence that was presented in

this hearing, I think is inappropriate. Six months is an absurd length of time to argue this case.

I'm prepared to make what little argument I have now. And I don't think it would last more than ten minutes, because the matter, I submit, is clear. And I don't need six months to come up with it.

THE COURT: Can we shorten the time period significantly?

MS. RODRIGUEZ: Absolutely, your Honor, we faxed it to the state for the very purpose of adjusting this so that we could have an agreed-upon order today. I apologize.

[292]

(Speaking simultaneously.)

MR. NUNNELLEY: If I could respond.

THE COURT: Just a moment, I will let you speak, but don't interrupt.

MS. RODRIGUEZ: That was the purpose of the fax, your Honor. We are more than willing to shorten the time period on the responses. We just simply used an order that we have used in another case. It was not tailored to this particular case.

THE COURT: All right. Well, as I look at this, I'm troubled not only by the time periods but by the number of pages. That's way too many pages on the issue before the Court. It's way too many pages at any time. But on the issue before the Court, it's way too many pages.

MR. NUNNELLEY: That's exactly what I was going to say. I feel an undercurrent of criticism directed at the state for not voicing an objection to this

proposed procedure. It's a matter of what will assist the Court. What does your Honor want us or feel is necessary for the state to do to assist the Court in making a decision in an expeditious fashion? If your Honor wants written, we'll do written closing arguments. If your Honor wants to submit the case right now, that fine with [293] us. If your Honor would prefer oral argument right now, that's fine with us, too. We'll do what the Court desires.

I will—I agree, I think 60 pages is a lot, the way this case has played out. You know, I think 60, 60 and 30 for filing is long. Again, the way this case has played out—in a complex case, that was not as clear as this one, these time frames might be appropriate. And, in fact, they are appropriate in some cases when we have a week-long evidentiary hearing with 15 or 20 witnesses.

We don't have that here. This is a simple case. I would suggest there is no real need for any further closing arguments at all. I think the case could be submitted right now. Your Honor knows what the issues are.

MS. RODRIGUEZ: Your Honor, I would point out to the Court that this case was simple at the outset, but it became quite difficult due to the various motions filed on the very first day, the motion in limine, proffer, everything that occurred in the proceedings. I would suggest to the Court that we are not unwilling to change the time period, but we would suggest to the Court that [294] there is more to write about than the state would present with regards to this issue. And because of that, I would suggest to the Court that we feel that it is necessary for us to do written closings.

Again, I'm not saying we can't reduce the amount of pages, but we would ask the Court to take all of that

into consideration because the proffer and the presentation of the evidence and all of that, that matter should be addressed by us to the Court in our closings.

THE COURT: Well, let me tell you what I'm thinking. I think it's generally easier to have a written document to work from when you are doing an order of this nature. So I'm not troubled by, necessarily, by the closing argument, although if both of you are ready to do your oral closing argument now or right after lunch, I would be okay with that.

But since this is the way you want to go, I'm not opposed to a written format for closing argument. This proceeding is going to have to be transcribed one time or the other, I'm sure. I'm sure, you know, somebody is going to want an appeal, no matter what I do. So we might as well get the transcript working. I do need to ask the [295] court reporter if she can transcribe this in 30 days?

COURT REPORTER: Oh, yes.

THE COURT: Okay. So 30 days I think is a reasonable period of time. Then I think the defendant shall file a closing argument—and I think 60 pages is way too many. I'm thinking more like 15 is about what it needs to be. Again, this is not your argument to—if that's where this is headed, to the Florida Supreme Court or the U.S. Supreme Court, 60 pages would bury me. I need something like 15.

And I want it—that's 15 pages. I guess, I'm going to have to rewrite it. I think that your closing argument from the defense should be within 30 days of receiving the transcript or say 30 days from the date that the clerk files the transcript with the Court. I mean, that's probably more—I mean, the court reporter files

the transcript with the Court. That's an ascertainable time. So, within 30 days, that's when you are going to do that. I know we're coming into the holiday season. But 30 days, still—

MS. RODRIGUEZ: That's fine, your Honor.

THE COURT: Then how much time does the state [296] need?

MR. NUNNELLEY: We'll ask for 30 and try to do it in 15, Judge. I'm not sure exactly when it's going to fall.

THE COURT: I know.

MR. NUNNELLEY: If we can have 30, we'll try to file quicker, just because I don't know what's going to get on the calendar.

THE COURT: Okay. So you want 30.

MR. TATTI: I'm sure we can limit our response to 15 pages, Judge.

THE COURT: Right. You get 15 also. Then the rebuttal, since you have the burden of proof, that makes sense, the defendant shall rebuttal no more than—I think that needs to be down to 10 or 15 days, something like that. How many days?

MS. RODRIGUEZ: Fifteen, your Honor, just because we don't know, as well, where we're going to be.

MR. NUNNELLEY: Judge, can I ask something here?

THE COURT: Sure.

MR. NUNNELLEY: If we can agree to file these by mail and by e-mail? In other words if the defense will serve me by e-mail, that means I don't [297] have

one that gets mailed on a holiday Friday and I don't get it until the next week. If they could e-mail me their document and indicate service by e-mail and regular mail in their certificate of service, we'll do the same thing and we will e-mail file with the Court, as well. Does that make sense?

MS. FAGAN: We won't do e-filings for these.

MR. NUNNELLEY: We could e-mail back and forth.

MS. RODRIGUEZ: I'd be happy to do that to assist Mr. Nunnelley, but I'm hesitant to put that into any written format.

THE COURT: You are just trying to speed up the time?

MR. NUNNELLEY: Judge, what I'm doing is something that's frequently done, and Ms. Rodriguez knows it, in death warrant cases. We routinely e-mail documents back and forth. I know the Court—I don't know if Hernando accepts e-filings or not. I think you said you don't.

MS. FAGAN: Not yet.

THE COURT: No. I think in probate, maybe, they are talking about it.

MS. FAGAN: Talking about it.

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MR. NUNNELLEY: But what I'm saying is we can put in this order that they will serve me by e-mail and I will serve them by e-mail, because I would certainly suggest if the Florida Supreme Court does that, which they do, this Court can also put that in the order without getting in trouble.

MS. RODRIGUEZ: Your Honor, I don't practice by e-mail. I do provide courtesy copies when I'm asked, and I can only represent to the Court that I'm not familiar with the rules permitting that.

MR. NUNNELLEY: Then I will withdraw the request, your Honor. It's become too much of an issue.

MS. RODRIGUEZ: I'm happy to do it.

THE COURT: No. We'll just—we'll use snail mail.

MR. NUNNELLEY: So that means I get the additional five days that I get for mailing, since she's insisting on not doing it any other way.

THE COURT: That's fine, that's right. I think we'll be okay with this procedure. So we have got up to 30 days for the transcript. As soon as it's received, then you have 30—defense has 30 days. Your brief will be no more than 15 pages. Then the state has up to 30 [299] days from receipt and their brief will be no more than 15 pages. And then the defense has rebuttal in 15 days and their closing—I think their rebuttal should be 10 pages.

MS. RODRIGUEZ: Yes, your Honor.

THE COURT: All right. Then we get to do our part as efficiently and as expeditiously as possible. But please understand that we are, like everyone, covered up. But we'll move it as quickly as possible.

Now, I will redo this order, since I have just marked it all up. I will get it redone and send it out.

MS. RODRIGUEZ: I have a spare copy.

THE COURT: We have got to change all the numbers.

MS. RODRIGUEZ: I will say to the Court, and Mr. Nunnelley may have seen this, as well, that you, the Court, can change the numbers and initial each one of those and file it with the clerk.

THE COURT: I will get it done right now. If the court reporter will start running—start the transcript as soon as you possibly can, that will get us going.

MS. RODRIGUEZ: We have provided our [300] information.

MR. TATTI: Can I request Ms. Marshall, that she notify the office of the state attorney when she has sent the transcript to the clerk because there is sometimes a lag.

THE COURT: If you will provide a card, I'm sure she will. Because there are lots of State Attorney's Offices, and I'm sure you want it sent to you. E-mail him or let him know that's been filed.

COURT REPORTER: Who do I bill?

THE COURT: Good question. The clerk [sic] wants to know who she bills? That's a great question.

MR. NUNNELLEY: What did we do in Hildwin, Judge?

COURT REPORTER: We got a purchase order from CCRC.

MS. RODRIGUEZ: We have provided a card to the clerk and if you will let us know as well when it's filed with the Court, we would appreciate that. We generate a purchase order, your Honor, and we take care of the fees.

THE COURT: So have it billed to your office?

MS. RODRIGUEZ: Yes, your Honor. If you would [301] contact our office, we provided the name, we'll give you the purchase order number so the state pays for it. And then I believe that the State Attorney's Office gets the file copy charges.

THE COURT: Agreed? Anything else?

MR. NUNNELLEY: No, your Honor.

MS. RODRIGUEZ: No.

MR. TATTI: I don't believe so.

THE COURT: Well, to the extent that everyone can, please have a happy holiday. If there is nothing further, court is adjourned.

MR. NUNNELLEY: Thank you, Judge.

MS. RODRIGUEZ: Thank you, your Honor.

THEREUPON, THE HEARING WAS CONCLUDED AT 12:59 P.M..

No. 12-10882

SUPREME COURT, U.S.
FILED
DEC 16 2013
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

FREDDIE LEE HALL,

Petitioner,

v.

FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JOINT APPENDIX VOLUME II OF II
JA381-533

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EVALUATION OF DR. BARBARA BARD

Name: Freddie Lee Hall Examiner: Barbara, Bard, Ph.D.
D.O.B.: 8/31/45 Date of Testing: 9/8/86
Address: Florida State Prison
Stark, Florida

TESTS ADMINISTERED

1. Woodcock-Johnson Psycho-Educational Inventory
2. Test of Written Language (TOWL) Hammill & Larsen Story sub-test.
3. Language Screening
4. Speech Screening—Goldman-Fristos Test of Articulation
5. S.U.P.E.R.—Learning Disabilities Screen

BEHAVIOR DURING TESTING

Mr. Hall was cooperative and civil. He attempted all test materials. When they became difficult, he seemed to shrug, accepting calmly that he could no longer continue the individual sub-test. He had difficulty scanning.

SCHOOL HISTORY

Mr. Hall claimed to have completed the eleventh grade. He was retained in first grade "because I couldn't read". He said he was "sick a lot" and missed "a lot of school". He appeared to have no idea what was wrong or what illness or condition caused him to be absent. Mr. Hall received no special help in school, and to the best of his recollection, was never enrolled in special education of any kind. His favorite subject was gym, especially track and basketball.

RESULTS OF TESTING

1. Woodcock-Johnson Psycho-educational Battery (see attached)

The only score which even approaches an adult level is one which has nothing to do with formal schooling, the Spatial Relations sub-test. The skill calls to select from a group of shapes, those that can be used to construct a sample figure. Mr. Hall's skills on this exercise are those of a child in the middle of the sixth grade.

All other subtests ranged from a grade level score of 0 to one of 4.7. Those which represent the ability to read and understand what has been read are representative of an almost total illiteracy. Though he knows the letters, he can neither read words nor can he interpret what the few words he reads mean. His math abilities are so low as to be below the first grade level. He did not get a single example correct on a test instrument which began with material on a pre-kindergarten level.

2. Speech and Language Screening

Mr. Hall's speech is often unintelligible. He lost the pattern of both / p-t/ and p-t-k/ in the diadochokinetic movements exploration though tongue movements were adequate in later parts of the procedure. An articulation test showed extreme dentalization of all tongue sounds, heavily accented (Southern) vowel pronunciation and intonation but no major errors. Nevertheless, Mr. Hall's speech is muffled and often unintelligible. When asked if anyone ever had any difficulty understanding him he said, "I be talking and sometimes I don't understand myself."

On the Prather Mini-Screening Test of Adolescent Language, Mr. Hall failed item three. He could not explain what did not make sense and why it did not make

sense in the following sentence. "The sun was shining so brightly last week on Tuesday that I had to wear my glasses in the movie theater."

3. S.U.P.E.R. Screening Survey for Learning Deficits

The only sub-test administered was the Visual Motor Integration Probe. Here Mr. Hall was asked to reproduce four geometric figures when presented with a sample printed on the page. He could reproduce only the first and simplest in a satisfactory manner. The others were all incorrect though he apparently made a concerted effort to copy them.

4. Test of Written Language—story Sub-test

Mr. Hall could not write a coherent story about a set of three pictures which depicted the bread-up of a planet, space travel to a new planet, and settlement on the new planet. He wrote one sentence and a fragment. He clearly did not understand that the pictures told a story, and after he was told that there was a story, he could not grasp its meaning.

SUMMARY AND CONCLUSIONS

Mr. Hall is an illiterate adult. His mathematical abilities are virtually non-existent. He is probably incapable of even the most basic living skills which incorporate math and reading such as understanding and paying a bill, writing a check, or keeping a checking account. Certainly, he would get very little from a daily newspaper. His speech is often incompressible and his use and understanding of language is no better than a nine year olds. His skills are so rudimentary that the assessment of whether or not he has a specific learning disability is difficult to make. Certainly, in the area of visual perception there is reason to suspect a considerable deficit.

REPORT OF DR. DOROTHY LEWIS (SEPT. 10, 1986)

Psychiatric Evaluation of Freddie Lee Hall:

* * *

Learning Disabilities Testing: According to Dr. Bard, Mr. Hall's functioning is, by and large, at the first grade level. For example, his Reading Comprehension was at the 1.5 grade level, his Concept Formation vas 1.0 level and his Analysis and Synthesis score was at the 1.0 level. Highest score in Spacial Relations was at the 6.3 grade level. Thus, Mr. Hall is severely learning disabled. A more detailed report is available from Dr. Bard.

Neurological Evaluation: According to Dr. Pincus, Mr. Hall shows a significant discrepancy between right and left performance on Finger Tap, suggesting a right hemisphere abnormality, although he said that Mr. Hall is slow on both sides. He suspected mild retardation and brain damage. He said that Mr. Hall's enlarged head circumference may be related to his brain damage, and he recommended a CT scan to rule out hydrocephalus. He also recommended an EEG be performed.

Conclusion: To summarize, Mr. Hall is a chronically psychotic brain damaged individual, with severe learning disabilities. His functioning is compromised further by use of alcohol or drugs. It is likely that the chronic severe abuse suffered at the hands of his mother and also his older siblings, and his exposure to extreme family violence in a household which the parents tried to kill each other, also contributed significantly to his violent behavior. Although we were unable, in the time allowed, to discuss the events of the crime for which he has been sentenced, it is extremely likely that Mr.

Hall's a paranoid ideation, psychotic misperception, and impulsivity secondary to brain damage, coupled with his history of extreme abuse, contributed significantly to the crime for which he is now sentenced.

/s/ Dorothy Otnow Lewis
Dorothy Otnow Lewis, M.D.
Professor of Psychiatry
New York University School
of Medicine

EVALUATION OF DR. JETHRO TOOMER

[letterhead omitted]

August 22, 1988

Attorney Judy Dougherty
Staff Attorney
Office of the Capital Collateral Representative
1533 Monroe Street
Tallahassee, Florida 32301

Dear Ms. Dougherty:

My evaluation of Mr. Freddie Hall was conducted on Thursday, August 18, 1988 for approximately three hours at the Florida State Prison. This procedure consisted of the psychodiagnostic interview, administration of the Wechsler Adult Intelligence Scale (partial), Bender-Gestalt Designs, Revised Beta Examination, and Carlson Psychological Survey (CPS) and Thematic Apperception Test (TAT).

As requested I have examined Mr. Hall to determine if any mental health related evidence in mitigation of sentence was available for presentation at the time of his 1978 capital trial.

The report that follows is based on the administration of the aforementioned instruments, the psychodiagnostic interview with Mr. Hall and an examination of the extensive records available. The report is also based upon my training and practice in psychological assessment and experience as a practicing psychologist. I have conducted numerous assessments involving the use of psychological tests and I teach graduate level courses in client assessment and psychotherapy. I have served extensively as an expert witness in civil and criminal proceedings for the past thirteen years and

have testified with regard to mental health issues in criminal cases. I am a tenured full Professor and Director of the Graduate Program in Community Counseling at Florida International University, Miami, Florida. Additionally I am licensed as a Psychologist in the State of Florida and a Diplomate of the American Board of Professional Psychology.

Interview Data

Freddie Lee Hall is a 43 year old single black man presently on Death Row at the Florida State Prison where he is awaiting execution for the murder. He was cooperative during the interview and responsive to requests for information. At the same time, it was extremely difficult to understand him as his speech was impaired and pronunciation of a number of words faulty. He attempted to make himself understood although not all ideas reached their intended goals without loosening of association. Many ideas were presented but not developed in a logical coherent fashion. Throughout the interview he described hallucinations, both auditory and visual. These hallucinations often keep Mr. Hall awake at night. The subject appears to be well oriented for time, place and person. He has little insight into the motives for his behavior. His judgment remains immature, juvenile and his ability to reason abstractly and discriminatively is severely impaired. While his thought processes ramble, the subject consistently describes hallucinations and visits by "spirits" which apparently are used by Mr. Hall as a coping mechanism. He described being able to walk as well as lay on water and when placing himself in a quiet posture, having the ability to raise the dead. He sees himself as eventually becoming a prophet or a "savior". There are certain paranoid themes recurrent in his de-

scriptions. His ability to control events remain a constant hallucinatory theme. The subject describes these hallucinations beginning early in his life and indicated that his mother helped to interpret these hallucinations and to find meaning in them.

Background:

The subject was born in Wildwood, Florida on July 21, 1945, and a few days later moved with his family to Webster, Florida. At the time of his arrest he resided with his mother. Presently both mother and father are deceased. According to the subject there were seventeen children comprising the family constellation, fathered by two different men. The subject was raised in a violent environment where he was severely physically abused on a regular basis. Compounding the abuse were conditions of extreme poverty. He described a continuation of this violent trend represented by the shooting death of a brother who was shot in 1957 and a sister who was shot to death in 1975. The subject's school history was characterized by frustration and a lack of success. Elementary school records reflect poor grades but no disciplinary problems. Counselors described him as being mentally retarded and having a mental age well below his chronological age. At age twenty-three, the Department of Correction's screening documents indicate that the subject's reading ability was at grade 2.6 and that grade placement was approximately 3.8. This same document dated February 11, 1969 described the subject as follows:

> "He seems to be very inadequate and seems to lack the ability to adequately cope with the complex factors of his environment. He seems also to lack the ability to reason through to logical conclusions, and problems of day to day liv-

ing, thus having a tendency to act out rather than to come to logical conclusions."

Records further indicate that the subject was denied access to military service and was classified 4F, a category designating poor mental and intellectual functioning.

Substance abuse has also formed a part of the subject's history. This substance abuse involved alcohol, narcotics and other substances. Although the subject denies alcohol being related to his hallucinations, others report that alcohol does indeed alter his behavior. For example, the statement given by Ann Gamble, who was with the subject prior to his arrest describes his memory loss, impulsive and aggressive behavior, and memory deficits manifested while under the influence of alcohol.

Test Results:

The results of the Revised Beta Examination indicate that the subject's level of intellectual functioning is in the range described as mentally deficient with a Beta I.Q. of less than 60. This score is reflective of very severe deficits in mental functioning.

Prior testing also reflects a low I. Q., (I. Q. of 80), but not as low as the current results. These inconsistent results may be explained by a number of factors. For example, the particular ability to respond to items tested by Revised Beta Examination is an area of weakness for Mr. Hall. The Revised Beta Examination relies heavily on visual motor functioning and visual spatial ability, which appears to be problems for Mr. Hall. These problems were also reflected in his responses to the Bender-Gestalt Designs examination which tests visual-spatial and visual-motor skills. Responses on the Bender-Gestalt Designs further reveal

the presence of reaction characterized by mood variability, poor impulse control and a tendency toward upheaval or panic around a traumatic, disruptive or identity threatening situation. Low ego strength, poor planning ability, scattered thought processes, learning disturbance and visual-motor difficulty are reflected in protocol responses. Protocol results also indicate the presence of organicity and acutely low intellectual functioning. Further testing would reveal the extent and nature of this organic disturbance, and would no doubt be congruent with earlier reports of brain damage.

Omissions and general poverty of responses to the pictures presented as part of the Thematic Apperception Test, are indicative of a repressed state, poor reality testing, and impoverished affect. Responses to questions selected from the verbal reasoning section of the Wechsler Adult Intelligence Scale were largely concretistic and inadequate. In addition when asked, "What do we mean when we say that a stitch in time saves nine?", he replies you save money to buy something. To the question, "What do we mean when we say that people who live in glass houses should not throw stones?" he admits having heard this but states that he did not know what it means, and added that a stone will break glass. This tends to be a concrete answer, missing the abstract point and obviously presenting difficulty in this area so that the projection of consequences and the ability to deal with abstract material is impaired. This is consistent with his impaired mental functioning.

The Carlson Psychological Survey (CPS) is a psychometric instrument intended primarily for individuals convicted and incarcerated for crimes. It recognizes the unique situation of these individuals as well as the

atypical reasons for referrals. Mr. Hall's CPS profile is as follows:

Factor	Percentile
Chemical Abuse	80
Thought Disturbance	95
Anti-social Tendencies	60
Self Depreciation	30

Such individuals have poor social adjustment and demonstrate difficulty in relating to others. Characteristics of impulsivity, intolerance, aggression, and irrational behavior are often evident. Depression is also present along with feelings of inferiority, and inappropriate affect. An unstable family life, physical abuse and poor relationships with parental figures are often characteristic of these individuals.

Summary:

Mr. Hall's deficits are longstanding in nature and contributed to the offense for which he has received the death sentence. Mr. Hall's mental and emotional illness, substance abuse, organic brain disturbance and the other deficits discussed in the report explain his involvement in the offense. These illnesses and deficits relate to the question of mitigation of sentence. From the perspective of Mr. Hall's mental health they answer important questions regarding his involvement in the crime.

Mr. Hall was administered a variety of psychological tests to assess his intellectual and personality functioning. The results are consistent with his history and reports of behavior manifested throughout his life. He functions in the mentally deficient range of intelligence, shows signs of mental illness, as well as organic brain dysfunction (it should be noted that the subject has ex-

perienced several incidents of head trauma throughout his life which may represent contributing factors to his brain damage and behavior, (e.g., a car accident in 1963, a boxing blow in 1967 and in 1975, a blow to the head by an iron pipe. Prior evaluation also note numerous instances of head trauma.) These deficits have manifested themselves over an extended period of time, however, no intervention was made to remediate these difficulties.

Mr. Hall suffers from an extreme mental and emotional disturbances, severe impairment of cognitive functioning, organic brain damage. History and the results of this evaluation reflect behavior symptomatic of serious mental deficits. His history is characterized by poor school achievement, poor socialization and a poor environment incapable of providing sufficient nurturing. He is unable to reason abstractly, and discriminatively or to project consequences and his level of mental functioning is characterized by being easily influenced. Additionally, Mr. Hall's use of alcohol and drugs, which clearly had an impact on his behavior and subsequent confrontations with the criminal justice system.

While the aforementioned information relates to mitigating factors, both statuatory and non-statutory, it also speaks to other important issues such as sanity or insanity at the time of the offense, the subject's intent and premedication or lack thereof, and competency to stand trial. The subject's intellectual deficits, lack of education, poverty stricken background, history of severe child abuse, emotional deficiencies, mental illness and organic brain damage, all combine to impact the mental health issues related to his level of culpability as well as his mental state at the time of the offense and at trial.

The subject's impaired level of intellectual functioning with it's attendant poor reality testing, inability to reason abstractly and discriminatively, would affect at all levels his participation in the offense and the criminal justice system. Mr. Hall's brain damage, substance abuse and the other facts descriptive of his impairment discussed in this report clearly related to and affected his level of culpability for this offense.

Overall, the subject's history, the numerous records I have reviewed regarding Mr. Hall, and the results of his evaluation and others provide clear evidence of mitigating factors relating to the subject's mental health. This information provides substantial data critical in evaluating Mr. Hall in regard to statutory and non-statutory mitigating circumstances.

Please feel free to contact me if I can provide further information in this regard.

Sincerely,

/s/ Jethro W. Toomer
Jethro W. Toomer, Ph.D.

EVALUATION OF DR. HARRY KROP

[letterhead omitted]

January 8, 1991

Mr. Michael Johnson, Esquire
Assistant Public Defender
P. O. Box 1687
Tavarres, Florida 32778

Re: Freddie Hall
Case No.: 78-52-CF

Dear Mr. Johnson:

At your request and per a Court order, Mr. Hall participated in a psychological evaluation with this examiner. Mr. Hall was referred to determine his competency to proceed, mental status at the time of the offense and possible mitigating factors in this case. Accordingly, this inmate was seen for extensive interviews on March 15, 1990 and September 25, 1990. Mr. Hall was also administered a battery of psychological tests which included the Wechsler Adult Intelligence Scale-Revised (WAIS-R), Wide Range Achievement Test-Revised (WRAT-R), Wechsler Memory Scale, Rey Auditory-Verbal Learning Scale, Bender-Gestalt Test, Right Left orientation, Finger Tapping Test, Finger Localization Test, Aphasia Screening Test and Background Interference Procedure. I also had an opportunity to interview Ethel Miller, oldest sister of Mr. Hall, Katie Mae Glenn, another sister, James Hall, the inmate's brother, Deanne Risby, Mr. Hall's sister and Henry Ellis, another brother. In addition, the following materials were reviewed:

1. Entire trial testimony
2. DOC medical and administrative records
3. A report (9-10-86 by Marilyn Feldman)
4. A report (8-12-88 by Dr. Dorothy Lewis)
5. A report (10-6-90 by Dr. Kathleen Heide)
6. A report and letter from Dr. Jonathan Pincus (12-5-90)
7. A report by Dr. Jethro Toomer (8-22-88)
8. A report by Dr. Barbara Bard (9-8-86)
9. A report by Dr. Leslie Prichep (9-5-86)
10. School records
11. An Affidavit by Dr. George Barnard
12. An Affidavit by James Hill
13. An Affidavit by Katy Mae Glenn
14. An Affidavit by Dianna Mitchell-Rigsby
15. An Affidavit by Howard Babb, Esquire, Public Defender
16. An Affidavit by Richard Hagin, Esquire
17. Various motions
18. Other legal documents
19. Various police reports

RELEVANT BACKGROUND

Mr. Hall and his Co-defendant, Mack Ruffin, were arrested April 21, 1978 for allegedly being involved in the murders of Carol Hurst and Deputy Lonnie Coburn. They were both subsequently charged with two counts of first degree murder and convicted, Mr. Hall

received two death sentences and has been incarcerated since that time on death row.

Mr. Hall derives from an unstable family background, the sixteenth child of seventeen children born to his mother. The interviews with various family members reveal that Mr. Hall was both emotionally and physically abused by family members as well as other adults. Although the inmate tends to down play his history of abuse, all individuals interviewed familiar with Mr. Hall suggest that the degree of physical and emotional abuse was quite extreme. Several examples of abuse were cited including being tied up, being hung from a tree, being forced to stay under a bed for hours at a time and being deprived of food. He was always viewed as being "weird" and teased tormentlessly at times. Mr. Hall had an extreme speech impediment when he was younger and had difficulty being understood. His parents were also abusive to each other. His father suffered a stroke when Mr. Hall was about five years old and left the family home and was not seen for several years. Despite Mr. Hall's severe speech impediment, he never participated in speech therapy and, to the contrary, family members report that Mr. Hall's mother would hit him in the mouth in order to stop his stuttering. Mr. Hall's mother drank heavily and her violent behavior apparently increased when she was drunk.

Mr. Hall was retained in the first grade but participated in regular classes until he quit in the eleventh grade. Despite his limited intellectual ability and inability to read, special education programs were not available for Mr. Hall. He worked in the fields from the time he was a young boy and did not have a stable vocational history. Mr. Hall had few friends, usually boys younger than he. He apparently did not date and has

never had a long lasting relationship with a woman. He was involved with a woman for awhile just prior to the instant offenses but this woman broke up with him a few days prior to the offense.

Although family members and Mr. Hall report aberrant perceptional phenomena as a child, there was no psychiatric treatment offered to him. He describes a number of hallucinatory experiences, even at the time when he was a preadolescent. Mr. Hall began drinking alcohol around the age of seventeen and started drinking regularly and heavily after his release from prison in 1973. He has used illicit drugs but his history of drug abuse is not clear. Mr. Hall was convicted of rape and incarcerated from 1967 to 1973, although the inmate indicates that he was falsely accused of this sexual offense. He served about six years for the rape conviction. Mr. Hall also acknowledged being involved in a few robberies prior to the instant offense.

CLINICAL IMPRESSIONS

Mr. Hall was seen on two different occasions in a private office at Florida State Prison. During both interviews, it was difficult to understand Mr. Hall because of his severe speech impediment. Although he was generally cooperative with this examiner, he exhibited paranoid ideation and was suspicious during both visits. On one occasion, his paranoia became exacerbated when the trial venue was discussed. This individual's social skills were quite primitive and his affect was depressed. He was generally protective in discussing his family and tended to generally minimize the abuse as reported by several other family members. He described his involvement in the instant offenses and his alcohol and drug use prior to the incidents. His thinking was very concrete and he showed almost no

insight into his emotional problems. Memory processes were impaired as was his judgment. He was oriented in all three spheres but had difficulty discussing current events in an informed manner.

Results of testing place Mr. Hall in the Borderline range of intelligence (VIQ=70; PIQ=79; FSIQ=73). Previous psychological testing has shown functioning ranging from mild mental retardation (Beta IQ=less than 60) to high Borderline (FSIQ=80). During the testing, Mr. Hall appeared to exert maximum effort and responded positively to encouragement. There was some anxiety present but the obtained results appeared to be a valid estimate of his true intellectual ability. Mental age for Mr. Hall is thirteen years. He reads at less than the third grade level. Memory processes on all tests are impaired and the results of the neuropsychological testing in general indicate perceptual motor deficits, orientation deficits and aphasia in different areas. He also showed deficits on the Finger Tapping Test and there is evidence of agnosia. Both verbal and visual memory functioning was impaired.

CONCLUSIONS

This is a forty-four-year old single, black male who was evaluated resultant to a Court order and a request to determine his competency to proceed and mental status at the time of the offenses. Mr. Hall participated in two different interviews and was administered an extensive battery of psychological tests. Additional legal and other pertinent materials were reviewed as this examiner spent approximately forty hours of time during this evaluation process. Mr. Hall is currently awaiting re-sentencing for the offenses which occurred in 1978.

The results of this evaluation reveal significant cognitive deficits but Mr. Hall is viewed as being *Competent to Proceed.* However, if Mr. Hall is placed in an environment which he views as stressful, his mental status may deteriorate. From the Defendant's self-report and other materials reviewed, Mr. Hall is also viewed as being *Sane* at the time of the alleged offenses. However, in view of this evaluation, a number of mitigating favors appear to be present. Based on this examiner's experience and evaluation of Mr. Hall, it is my opinion that the following mitigating factors exist in this case:

1. Organic Mental Syndrome;
2. Functional Retardation;
3. Schizotypal Personality Disorder;
4. Mr. Hall is functioning at an age level (mental) of thirteen years;
5. History of physical abuse;
6. History of emotional abuse and neglect;
7. Mr. Hall suffers from a severe speech impediment which resulted in limited social skills and an impaired self-concept;
8. Lack of father figure and a positive role model;
9. Cultural, educational and emotional deprivation.

All of the above factors have contributed to an individual whose judgment is significantly impaired and who grew up in life to view himself as a failure. Coping skills were extremely inadequate and ineffective. He received no treatment or intervention for the various disorders which therefore went uncorrected.

Thank you for the opportunity to evaluate this interesting individual. Please feel free to contact me if I can provide any additional information.

Respectfully submitted,

/s/ Harry Krop
Harry Krop, Ph.D.
Licensed Psychologist

HK:es

EVALUATION OF DR. BILL MOSMAN

[letterhead omitted]

November 19, 2001

Eric Pinkard, Esq.
Assistant CCRC
Capital Collateral Regional Counsel Middle Region
3801 Corporex Park Drive
Suite 210
Tampa, FL 33619

Regarding:	Freddie Lee Hall
DOC:	022762; P117S
DOB:	7/21/45
DOE:	9/25/01
Age:	56 years 2 months
POE:	UCI

Dear Mr. Pinkard:

REASON FOR EVALUATION:

It was requested that I provide a forensic evaluation to assist in the determination of whether or not Mr. Hall is mentally retarded within the meaning of Florida Statute 921.137.

SUMMARY:

It is well within a reasonable degree of clinical certainty that Mr. Hall is, in fact, mentally retarded within the meaning of Florida Statute 921.137 in that Mr. Hall does have significantly subaverage general intellectual functioning which existed concurrently with deficits in adaptive behavior and manifested during his developmental period, conception to age 18. Mr. Hall's intellectual performance is two or more standard deviations from the mean score on standardized intellectual tests

as determined by instruments specified in the rules of the Department of Children and Family Services.[1] Additionally, Mr. Hall had and has concurrent deficits in adaptive behavior, as measured by appropriate and approved instruments. Both the intellectual and adaptive deficits occurred and had an onset during Mr. Hall's developmental period (from conception to age 18) and have continued throughout his life as would be expected of an individual suffering from mental retardation.

SCOPE:

The forensic issues involved in a case such as this are clearly outside of the range of the general practitioner's expertise. Both psychiatry and psychology promulgate special guidelines which require familiarity with legal developments and forensic issues not found in the more normal practice situation.[2] As such, I was guided by the Specialty Guidelines for Forensic Psychologists[3] which states that I am responsible for knowledge that goes beyond that manifested during more traditional psychological service activities. The purpose of these "more spe-

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[1] The Department of Children and Family Services HRS Regulation 160-2D, Chapter 3, outlines in detail the intellectual and adaptive instruments which are approved for the determination of mental retardation in the State of Florida. Intellectual assessment shall be done with the Stanford-Binet, the Weschler, or the Leiter. Adaptive levels of functioning shall be assessed using the Vineland Adaptive Behavior Scales.

[2] See Ethical Guidelines For The Practice Of Forensic Psychiatry, *American Academy Of Psychiatry And The Law*, May 1987, revised October 1991 and the Specialty Guidelines for Forensic Psychologists, *Law and Human Behavior*, 1991.

[3] Committee on Ethical Guidelines for Forensic Psychologists, Specialty Guidelines for Forensic Psychologists, *Law and Human Behavior*, 1991 (hereinafter referred to as Guideline).

cific" requirements are to "improve the quality of services offered to the legal system." Inherent in this process is a "responsibility for a fundamental and reasonable level of knowledge and understanding of the legal and professional standards," and the "obligation to maintain current knowledge of legal developments" and to "use that knowledge, consistent with accepted clinical and scientific standards."[4] Forensic evaluators need to be familiar with, i.e., case law, statutes, and statutory interpretations. This "obligation to become minimally educated in the nuances of law and legal procedure"[5] suggests that practitioners "must learn two epistemological systems."[6] This "interface of two professions" requires knowledge of "procedures, values, and vocabulary" of both professions so as to avoid "conflicts, misunderstandings and abuses."[7] One must have knowledge of the law and integrate that knowledge into the preparation and presentation of findings.[8] This is viewed as necessary so as to provide "some direction to evaluators."[9] These comments are mentioned to clarify that the following report, phraseology, and conclusions are clinical

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[4] Guideline III. Competence and Guideline VI, Methods and Procedures.

[5] Melton, G. B., Petrila, J., Poythress, N. G. & Slobogin, C., (1987). Psychological Evaluations For The Courts: A Handbook For Mental Health Professionals And Lawyers.

[6] Donald Bersoff, Jane Goodman-Delahunty, J. Thomas Grisso, Valerie Hans, Norman Poythress, Jr., and Ronald Roesch. 1997. Training in Law and Psychology. *American Psychologist.*

[7] Supra, at 2.

[8] David Shapiro. July 1999. The Forensic Practice. *The Florida Psychologist.*

[9] Weiner, I. B. and Hess, A. K. (1987). Handbook of Forensic Psychology.

in nature and are neither representative of nor to be misunderstood to be statements of legal theories of the matter or interpretations of law.[10] Only those functioning as attorneys or the court in this matter can perform those tasks and duties.

REPORT BASED UPON:

Please see Appendix A.

PRESENTING INFORMATION:

Please see the enclosed time line chart depicting history relevant to Freddie's mental retardation.

Mr. Hall was born and raised in the area of Wildwood, Florida. He thinks he has approximately 4 brothers and 2 sisters, with one of each being deceased. When he was age 12, 1957, he had a brother who was shot to death. A sister was also shot to death in 1975 when he was approximately age 30. The records reviewed indicates that there were significant prenatal deficits, and he and his siblings were exposed to severe violence, torture, victimization, and impoverishment that could be described as horrific at minimum. While exposure to those developmental experiences are in and of themselves known to produce significant adjustment difficulties, Mr. Hall had the additional burden of suffering from very low intellectual abilities/mental retardation. I bring this up at this time because the dual themes of mental retardation and mental illness permeate his entire history.

For a number of years it has been known that individuals with intellectual/developmental disabilities have approximately a 500% increased incident rate of acquiring

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[10] Guideline VI.F. Public and Professional Communications.

a co-existing mental illness as compared to normative groups because of the simple fact that they do not have the ability to understand, conceptualize, integrate, and or adjust mentally to stressors and adversity. Consequently, their psychiatric condition deteriorates, breaks, and a secondary co-existing mental illness appears.[11]

Significantly, Freddie failed first grade and during his second attempt school records noted that his "mental maturity (was) far below his chronological age." In second grade, it was noted that he was very inattentive and also extra slow in comprehension. In third grade, 1954, it was noted that he was slow in all of his work. In 4th grade, 1955, it was determined that he was mentally retarded and that he had a mental age equivalent of an approximately of 8 years and 10 months old child.

The following year, 5th grade, it was determined that Freddie was slow in all phases of his work and that he was mentally unadjusted. In 1958, 7th grade, it was confirmed that he was mentally retarded. It was also determined that he was mentally retarded the next year, 8th grade, 1959. The records do not indicate that Freddie was provided special education or special teacher services even though such services were requested.[12]

His school progress notes state that in the last year in which his class standing was provided, 7th grade, he

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[11] For example, Nirbhay N. Singh, 1995, Moving Beyond Institutional Care for Individuals with Developmental Disabilities, *Journal of Child and Family Studies*. A study supported by a grant from the U.S. Department of Education,

[12] See transcript of Re-sentencing Hearing, December, 1990, testimony of Ms. H. Foster, Assistant Superintendent of Schools, pp. 869-873.

was 21 out of a class of 21. He received 7 F's, 4 D's, and one grade is illegible.

During the developmental period of his life he was described as being childlike, couldn't understand, was very late in developing speech, could not read or write even though in addition to teachers his sister younger by 13 years attempted to help him practice his writing. Records indicated that he mentally did not function like other children and that the school basically "socially promoted him most of the time" so that he could remain eligible to play football (he was chronologically older than the other children).

In those years mandatory registration at the Selective Service Board was required. He was drafted and sent to the Naval Air Station in Jacksonville, Florida for processing which included testing and, in Freddie's case, talking to several psychiatrists.[13] He was rejected and returned home. Mrs. Hawkins, Draft Board Clerk, verified that Freddie was rejected by the Selective Service Board in 1965 because of "very low scores on mental examinations."[14]

The Lake Butler Classification and Admissions testing, December 24, 1968, indicated that Freddie specifically lacked the ability to reason logically, he read at the 2.6 grade level (equivalent to about an age of an 8 to 9 year old child), and had a Beta IQ of 76. Additional testing two months later, February 11, 1969, at FDC indicated that he had a reading recognition level of about 3.8

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[13] See Transcript of Re-sentencing, December, 1990, testimony of Mr. Hall's trial attorney, Mr. Hagin, pp. 863-864.

[14] Florida Parole Commission Pre-Sentence Investigation, 12/5/68, p. 3.

grade levels, a 9 to 10 year old child. Significantly, Freddie was 24 years and 5 months of age at that of time.

Mr. Hall's current situation results from the sexual assault and homicide of Mrs. Hurst on February 21, 1978.

Records indicate that approximately two months later, April 22, 1978, Dr. Carrera, a psychiatrist, stated that "Mr. Hall's intelligence is average." However, this determination was made during a competency examination and was part of a mental status examination which is significantly different than an examination to determine a formal assessment of intellectual functioning. The mental status examination, in this particular case, was nothing more than a conclusory label by Dr. Carrera speculating on some level of intelligence.[15] It should be noted that within that same mental status exam the doctor stated that Mr. Hall could only abstract 2 of 5 proverbs, his immediate and short-term memory was moderately impaired and that the human figure drawings lacked detail and indicated poor body image formation. Clearly, no appropriate testing was done and the report does not indicate in any way that any previ-

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[15] Bazelon, David L., Humber, & Almeder, eds., *Biomedical Ethics and the Law*, Plenum Press, 1976. "Challenging the expert and digging into the facts behind his opinion is the life blood of our legal system. It is the only way a judge or jury—or the public—can decide whom to trust." "Conclusory labels are no substitute for facts derived from disciplined investigation." See also, The President's Committee on Mental Retardation, *The Mentally Retarded Citizen and the Law*, The Free Press, 1976. The offering of pseudo-scientific labeling and classification terminology instead of accurate diagnoses, especially in the area of mental retardation, has lead to many "tragedies that are too severe to be justified by administrative necessity."

ous records were reviewed. Of course, such a review and/or testing would not be necessary during and or for a competency evaluation.

Four months later, June 27, 1978, Mr. Hall was sentenced to death for the earlier homicide and sexual assault on Mrs. Hurst. Two and a half weeks later, July 13, 1978, Mr. More, a psychologist at FDC obtained a Kent IQ Score of 79 and a Reading Level of 2.8 grade levels upon Mr. Hall.

On September 13, 1978, a confidential evaluation within the Department of Corrections indicated that Mr. Hall "would be considered Borderline Retardation in Intellectual Ability." Parenthetically, it should be noted that Borderline Retardation was an official diagnosis from the DSM system in 1978 and was separately consistent and compatible with then existing Florida statutes on retardation. Thus, once again, within then existing statutory and diagnostic parameters, Mr. Hall would have been considered to be mentally retarded.

In September of 1986 it appears that there was a major impetus to finally get a clear picture of Mr. Hall's mental and cognitive functioning through the services of a team lead by Dr. Dorothy Lewis from the New York University School of Medicine. On September 8, 1986, Dr. Bard did a wide range of testing and determined that all of Mr. Hall's test scores were equal to a 6 to 11-year-old child and fell between 0 and 4.7 grade levels in all areas of assessment of cognitive process and functioning. Dr. Richardson, a neuropsychologist, determined that Mr. Hall had severe brain impairment. Dr. Pincus, a neurologist from Georgetown University Hospital, did not write a report until approximately two years later, 8/22/88, but did evaluate Mr. Hall on

September 8, 1986 and stated that he suspected the presence of mental retardation in addition to brain damage. He requested a CT Scan and an EEG.

The team leader, Dr. Lewis, a psychiatrist, evaluated Freddie on September 10, 1986, and concluded that Freddie was both brain damaged and that there was evidence of psychosis with onset in childhood.

That same day, September 10, 1986, a student, M. Feldman, tested Mr. Hall and felt that data showed evidence of a psychotic disorganization, possible organic brain damage, and was a man with limited intelligence. A WAIS-R revealed a VIQ of 77, PIQ of 85, and FSIQ of 80.

Five days later, September 15, 1986, Dr. Prichep following up on Dr. Pincus's earlier recommendation, obtained an EEG and it was determined that Mr. Hall had a moderately abnormal brain tracing, indicative of abnormal brain functioning. This confirmed the findings of earlier test results and assessments.

On August 21, 1988, Dr. Barnard provided an affidavit indicating that his earlier evaluation found the presence of significant mental and emotional deficits.

The following day, August, 22, 1988, Dr. Toomer evaluated Mr. Hall and obtained a Beta IQ of less than 60 but was unable to give a specific number as the Beta's conversion tables do not go below 60. Additionally, the doctor noted the presence of organic brain damage. Parenthetically, during testimony before the Honorable Richard Tombrink, Jr., December 14, 1990, Dr. Toomer

specifically diagnosed Mental Retardation in relationship to Mr. Hall.[16]

On March 9, 1989, the Florida Supreme Court reversed and remanded Mr. Hall's case back to the Trial Court for re-sentencing.

On September 7, 1990, Dr. Heide reported and described significant mental and emotional abnormalities.

A few months later, December 5, 1990, Dr. Pincus stated that Mr. Hall had generalized brain damage with special difficulty in the right hemisphere. Dr. Pincus also indicated that there was a co-existing thought disorder present (mental illness).

The next month, January 8, 1991, Dr. Krop reported on his evaluation of Mr. Hall during early and mid 1990. Dr. Krop wrote that Mr. Hall was functionally retarded, had a mental age of a 13-year-old, and received a WAIS-R VIQ of 70, PIQ of 79, and FSIQ of 73.

The following month, February 21, 1991, the Honorable Richard Tombrink, Jr., wrote a thirty three page Findings of Fact and Judgement and Sentence Order subsequent to the completion of the re-sentencing hearing. Judge Tombrink imposed a sentence of death upon Mr. Hall. Relevant to the present inquiry, Judge Tombrink specifically found that there was substantial evidence in the record to support a finding that Freddie Lee Hall had been mentally retarded his entire life, however, reading the order, there was evidently no meaningful testimony relating that deficit to Mr. Hall's state of

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[16] Dr. Toomer's testimony, page 1076, Re-sentencing Proceedings, December 14, 1990.

mind at the time of the crime as related to Statutory Mitigators.. After reading the trial testimony of the experts during the re-sentencing hearing, I would agree that there was an absence of any meaningful testimony discussing the interrelationship and chronic and stable test scores from childhood through the re-sentencing process or any of the issues of mental age equivalence and/or how a cognitive mental age of a 11 to 13-year-old child would be different from those of an adult and how those differences would affect the ability to interpret, perceive, understand, analyze, make judgements about, form intent etc., at the time of the crime as related to Statutory Mitigators. In fact, I would go one step further and indicate that it is clear, at least to me, that the Judge had absolutely no testimony or guidance in that type of analysis. The Court attempted to do so when discussing the Statutory Mitigator of Age by arbitrarily reducing Mr. Hall's chronological age by 33% "on account of mental retardation, mental defects, and so forth" and determined that even if that were done Mr. Hall would have had a mental age of a 22-year-old at the time of the crime based upon a 33% reduction of chronological age of 33.[17] In relationship to mental retardation and separately mental illness and non statutory mitigators, the Court, in a number of instances, indicated that there was "substantial evidence," "greater weight of the evidence" demonstrates, "overwhelming" evidence, etc. but in each case concluded that the testimony as presented made the weighing "unquantifiable."

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[17] Please review page 18 of the Court's Sentencing Order, 2/21/91.

In June of 2001 Florida Statute 921.137 was enacted which prohibits the imposition of the death sentence upon a mentally retarded defendant. Thus, the current evaluation was requested.

CURRENT EVALUATION:

At the present evaluation, Mr. Hall presented as a cooperative 56-year 2 month old man. Throughout the interview and examination session his hand cuffs had been removed so that there were no impediments related to his performance or manipulation of some of the test items and objects. He indicated that he was feeling well, was not ill, but was on some type of medication to help him with voices and things that he hears and sees. He was not at all certain what type of medication he was taking but stated that he took 3 pills at night and 2 in the morning. He stated that the medication did help him but occasionally he continued to see things that frightened him, snakes, people, devils. He indicated that he was not seeing or hearing things during the exam and that there were absolutely no signs that he was responding to internal stimulations during the testing session. I only bring this issue up to indicate that the medication does appear to be working but that it would also be appropriate to have a medication re-evaluation just to see if there would be any adjustments that could be reasonably made. He was oriented in all four planes. He did have difficulty with short and long term memory; that has been consistently reported for the last many years.

TEST RESULTS:

Both of the instruments used to assess intellectual functioning, the Wechsler and Leiter, are specifically listed as approved instruments in the above noted De-

partment of Children and Family rules as appropriate and acceptable for the determination of Mental Retardation. Additionally, the Vineland Adaptive Behavior Scales is the approved instrument for the formal assessment of adaptive functioning. The other tests that I administered were provided to assist in clarifying and/or adding additional information to the basic and fundamental analyses.

Wechsler Adult Intelligence Scale Test-III:

Verbal IQ 73 Performance IQ 70 Full Scale IQ 69

Vocabulary 5	Picture Completion 4
Similarities 8	Digit Symbol 5
Arithmetic 5	Block Design 7
Digit Span 7	Matrix Reas. 6
Information 5	Picture Arr. 4
Comprehension 3	Symbol Search (3)
L-N Sequencing (5)	

On this particular instrument, Mr. Hall received a Verbal IQ of 73, a Performance IQ of 70, and a Full-scale IQ of 69. This places his intellectual level more than two standard deviations below the mean, in the lower two percentile and would be classified as "Extremely Low" as per the Classification Index used in the Technical Manual,[18] This is translated into the Mentally Retarded Range under the categorization scheme of both the current clinical diagnostic manuals and relevant Florida Statutes, 921.137 as well as 393.063(42). Mr. Hall's subtest scores had some variability, most if not all persons tested show variability. However, there are no statistical differences in the variability between any of the

[18] Please review page 184 of the WAIS-III Technical Manual.

subtest scores and the average of the Verbal Mean, 5.5, Performance Mean, 5.2, and or Full Scale Mean, 5.36. This is indicates that Freddie's "general level of intellectual functioning," is in fact, that of a mentally retarded person. It is of value to note that all sub-tests on the Performance side of this instrument were "flat" in that there were no significant differences between any of the possible combinations of the Performance subtest scores. The same is not true on the verbal side of this instrument. In this particular case, there is a statistically significant difference, .05 level, between Mr. Hall's Similarities and Digit Span scores as compared to his notably lower Comprehension score. This would simply suggest that while still in the intellectually deficit range, Mr. Hall does have, as compared to himself, better skills in concentration, attention, and some levels of abstract reasoning as compared to his significantly deficit and lower ability to understand, comprehend and make judgements. He might well be able to, by comparison, attend and see the connection between various things but he cannot analyze and comprehend the meaning of those items with the same accuracy. In fact, the Comprehension score of 3, the lowest of the entire test, would be equivalent to an individual with an IQ of 55. His ability to comprehend, analyze, and make judgements as measured by the Comprehension subtest would be equivalent to the lower 10 individuals of a 10,000 member peer group. Out of 10,000 of his same chronologically aged peers, there would be 9,990 with better abilities to comprehend, analyze, make judgements, draw inferences, etc., as measured by that scale.[19]

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[19] Please review Table 2.2, Table B.3, and Table B.4 in the WAIS-III Administration and Scoring Manual.

The WAIS-III also is helpful in that it indicated that Mr. Hall had a Processing Speed Index of 69, second percentile, which notes that his abilities to process information, select relevant from non-relevant detail, summarize and come to an understanding, awareness, and/or conclusion of said data and information is, similarly, equal to that of a mentally retarded person. Out of 100 of his same age peer group, 98 would be able to manage, process, and "move" information and data through their analytical systems more efficiently and faster than Mr. Hall.

The Leiter Adult Intelligence Scale:

This test is often used for special purposes in the assessment of mental retardation under the Florida statutory scheme. In this particular situation, Mr. Hall received a Verbal IQ of 55, a Performance IQ of 47, and a Full Scale IQ of 52. The Leiter scores are lower than the Weschler scores as the Leiter specifically taps into processing and analytical functioning and, as stated, is used as an exclusionary/confirmatory diagnostic tool. The value of administering both the Leiter and the Wechsler is that, as in this case, there can be no reasonable concern that Freddie is not mentally retarded in relationship to the intellectual prong of the statutory and separately the diagnostic criteria.

The Slosson Intelligence Test—Revised Version

This instrument allows the identification of a mental age equivalent. In this particular case Mr. Hall received a score equal to that of the average 10-year 6-month old child. His cognitive and intellectual abilities are that of a 10 1/2 year old child.

The Wide Range Achievement Test—Revision III

This test indicates that Mr. Hall reads, spells, and is able to do arithmetic problems equal to that of a first grader. That would place him academically at about age 7. He can spell a few words like CAT, BOY, RUN, and ARM. He does know the alphabet, can read a few simple first grade words, but nothing more. He thinks that 5 minus 3 is equal to 8, cannot subtract numbers that are horizontally laid out or vertically laid out. He cannot add two numbers with two digits in each number. He can count three ducks and show 8 fingers.

Trail Making A and Trail Making B

I administered both the Trail Making A and Trail Making B. Trail Making B is considered to be helpful in identifying the presence of organic brain damage. In this particular case, while it took 222 seconds for Mr. Hall to complete Trail Making B that completion was only done subsequent to multiple errors. He could not appropriately accomplish this, on the surface, simple test. This test is considered to be a "well established, sensitive test" and is helpful in a case such as this as scores are affected by basic neuro cognitive functioning. Mr. Hall's score of 222 seconds is more than 3 standard deviations away from the mean of a control group in his same age bracket.[20]

Vineland Behavior Adaptive Scales:

Finally, coming to a formal assessment of adaptive levels of functioning as per both legislative and diagnostic schemes, the Vineland Adaptive Behavior Scales was

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[20] Please review a discussion of this in Spreen and Strauss, 1998, *A Compendium of Neuropsychological Tests*, 2nd ed.

administered. Mr. Hall received a Communications Domains Standard Score of 40, a Daily Living Domain Standard Score of 56, and a Socialization Domain Standard Score of 71. This results in an Adaptive Behavior Composite Standard Score of 51. Analyzing these scores reveals that Mr. Hall not only has difficulties in receptive and expressive language but he has even more serious and severe difficulties in written language areas of communication. Similarly, as is reflected in the record, in the area of Daily Living Skills, Mr. Hall has severe deficits in both Community and Domestic areas of functioning with mild to moderate deficits in the areas of Personal Functioning. The Socialization Domain, as measured, notes across the board deficits in Interpersonal Relationships, Coping Skills, and Time Structuring. The Composite Score is equal to a Standard Score of 51, which is over 3 standard deviations lower than what would be expected and/or seen in a nonretarded individual. The mean and standard deviation of the Vineland is the same as those found in the intelligence tests used. This allows for meaningful comparisons and integrations. The appropriate charts and tables were utilized for the assessment of mental retardation as that was the question posed in the referral. The Vineland scores are of definitive value in that they allow the differentiation of mental retardation from psychosis and provide a foundation for prioritizing and evaluating the interaction of those two disabilities.[21]

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[21] Stanley R. Kay. (1989). *Cognitive Battery for Differential Diagnosis of Mental Retardation vs. Psychosis.* Research and Developmental Disabilities, 10, pp. 251-260. The diagnostic confusion between mental retardation and psychosis carries dire consequences for the patient. Cognitive abnormality (psychosis) is qualitatively different than mental subnormality (mental retardation). Thus, mental subnormality reflects intellectual deficits character-

DIAGNOSTIC DISCUSSION: DSM-IV-TR

Axis I	315.00	Reading Disorder
	315.1	Mathematics Disorder
	315.2	Disorder of Written Expression
	295.90	Schizophrenia, Undifferentiated Type, in partial remission and fairly well-controlled with medication. However, a medication re-evaluation would be suggested.

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istic of mental retardation while cognitive abnormality is disrupted or regressed intellectual functioning related to psychosis. Mental retardation is mental subnormality with failures in adaptive functioning during the developmental course. By contrast, psychosis can produce defective intelligence, but of nondevelopmental origin, typically the consequence of regression or a disorganized state seen most noticeably in schizophrenia. Psychotics often exhibit failures in adaptive functioning though due to psychiatric rather than developmental reasons. The misdiagnosis of an early intellectual disorder may carry dire psychiatric consequences. Despite the similarities and overlap among cases with subnormality and abnormality, there remain several crucial distinctions. These are to be found in the longitudinal and qualitative aspects of the mental deficiency, namely its source and nature, rather than in the surface IQ measure. The likelihood of the mental deficiency representing something other than retardation is, of course, especially pronounced in a psychiatric population. IQ scales lack construct validity with psychiatric patients, because defective scores cannot be related to the presumed construct. A low IQ may signify mental subnormality, cognitive abnormality or any number of noncognitive symptoms. The IQ measure may be regarded as a surface index of general intellectual functioning which is contaminated by sundry cognitive and noncognitive impairments that are intrinsic to schizophrenia and carry no specific developmental import. The Vineland scales distinguishes adaptive failure relating to developmental versus psychiatric factors. A comparison of developmental levels in the subareas assessed further reflects on the generality of the social deficit.

	995.54	Physical abuse as a child
	995.52	Neglect as a child.
Axis II	317	Mild Mental Retardation with some testing noting that Mr. Hall could alternatively be diagnosed as having 318.0 Moderate Mental Retardation. However, I believe that 317 is the less intrusive and more conservative diagnoses.
Axis		Chronic historic anecdotal, testing, and neuro assessment data confirming the presence of organic brain damage.

DISCUSSION:

It is my opinion, well within a reasonable degree of clinical certainty that the primary mental disorder/disability that Mr. Hall has is Mental Retardation which, by definition, existed during childhood, his developmental years, and manifested with then existing concurrent deficits in adaptive functioning and measured subaverage levels of intellectual functioning. This has held true throughout his entire life and because Mental Retardation "isn't cured" will be there until the day he dies. As is clear in the records, Freddie reached his intellectual "zenith" at about a chronological age of between ten and twelve when it was repeatedly noted that he functioned similar to an eight or nine year old child. It is also clear from the records, testing reviewed and current evaluation that Freddie has a coexisting mental illness, Schizophrenia, chronic undifferentiated type. But, that has been secondary. The Vineland differentiates between mental retardation and psychosis, pleases see the discussion above. Additionally, during

periods of remission or partial remission *and more relevantly* during periods of appropriate medication, there is no evidence that Freddie's mental functioning improved in any meaningful manner. Remission and/or medication should have seen a parallel increase in mental functioning if, in fact, the mental illness was the primary and major mental impairment.

Mr. Hall represents another unfortunate case wherein his Mental Retardation was well known but was never responded to appropriately as there is absolutely nothing in the records indicating that he was referred to or made a client of the original Office of Mental Retardation during the 1950's and 60's, his developmental phase even though it is absolutely clear that he would have been eligible for services for the mentally retarded.

All reports of testing and analysis of this issue prior to 1980 were actually consistent in identifying levels of intelligence and diagnostic statements noting the presence of Mental Retardation. I specifically chose 1980 as a point in time because in approximately 1979 to 1980 both the Florida statutory scheme for Mental Retardation and the diagnostic criteria in the professional literature changed. However, had Mr. Hall been appropriately referred to and made a client of the Office of Mental Retardation subsequent to that change there were directions in the Laws of Florida for re-testing and re-evaluation. Those individuals who were no longer eligible were to be given transition services into the appropriate agency responsible for their management. There is nothing to suggest that Freddie would have been transferred, he would have been one of the clients who should and would have remained with the then brand new Department of Developmental Services, the progeny of the Office of Mental Retardation. Had such

services been provided, the course of both Mr. Hall's and Mrs. Hurst's lives would reasonably been different; monitored vocational training, supervised residential living resources, structured social and activity support, financial support for the disabled through the state and Federal Government, consistent and appropriate medical and pharmacological services, etc. That type of information well could have been critical during trial and the various re-sentencing hearings.

I have already indicated that Dr. Carrera's speculation about Mr. Hall's intellectual level was in no way based upon any accepted professional standard of assessment. I also indicated that the doctor's evaluation was provided for a Competency Hearing and while not directly related to Competency an appropriate assessment could have been of value because it was not until after the trial was over that Mr. Hall's attorney became aware that Mr. Hall could not write. During the Resentencing Trial on December 19, 1990, T. Richard Hagin, the trial attorney for Mr. Hall, testified that he originally told Mr. Hall that he, Mr. Hagin, was going to have to concentrate his attention upon witnesses, etc. and that he, Mr. Hagin, wanted "Freddie" to take a piece of paper and a pencil and write down anything that Freddie wanted Mr. Hagin to ask either the jury during voir dire or witnesses during the trial itself. Approximately one week later, after the trial was over, Mr. Hagin looked at the paper and found out that Freddie had only written the numbers 1 through 12 or perhaps 1 through 13 on the paper and did not learn until later that Mr. Hall could not write. Mr. Hagin also stated that Freddie Lee did not help him in the trial at

all and that he could not really understand anything that Freddie said.[22]

I think it would be additionally important to comment about M. Feldman's test scores obtained on September 10, 1986. While a few questions were asked about the Feldman scores, e.g., Dr. Toomer,[23] there were no questions regarding the difference between the Feldman scores and all other testing noted in the records up to that point in time.

First of all, M. Feldman was a student. She was not in any way licensed or trained to independently test anybody much less a defendant in this type of a case. Her supervisor was not on the premises and in fact remained in New York while she was here in Florida doing the testing. Dr. Lewis, the team leader, testified that the team was originally set up to test juveniles in Florida but that a telephone call from Mr. Hall's attorney resulted in the team including Mr. Hall as a subject for evaluation during the teams study of the juveniles. Dr. Lewis testified she wanted to have a professor of psychology supervise the student, M. Feldman, and a senior psychologist on faculty at Feldman's school provided that supervision.[24] There are very good reasons why students are not independently licensed or qualified to do testing and why there are additional mandates that when a student is doing testing that a super-

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[22] Transcript of Re-sentencing, December, 1990, testimony of Mr. T. R. Hagin, pp. 862-863.

[23] See for example, Dr. Toomer's testimony during the December 1990 re-sentencing hearing, pp. 1100-1103.

[24] See Dr. Dorothy Lewis' testimony taken before trial on October 15, 1990 in New York, pp. 7, 11, and 12.

visor actually be on premises and, in a case like this, should actually observe the testing and/or interview the subject if, for some reason, the student is going to go ahead and perform the testing. At a graduate course level, there is a significant difference between testing juveniles and adults.[25] It is noteworthy that neither M. Feldman nor the faculty supervisor testified or was deposed or communicated with in any manner. In fact, Feldman's report does not state that she was a student, was under supervision, and the report also is not countersigned by the supervisor; all in direct violation of several ethical, testing, and practice standards

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[25] Maloney, M.P., *A Clinician's Guide to Forensic Psychological Assessment*, The Free Press, 1985, pg. 3, "An examiner may well know how to administer individual intelligence tests in a standardized manner and how to interpret an I.Q. as a deviation score or as a ratio score. This is not sufficient, however, to complete a psychological assessment of intelligence. To determine intelligence, the examiner must be well grounded in a number of issues relating to the nature of intelligence: how it is differentially manifested, how I.Q. scores may vary at different times in an individual's life, and so forth. The content area then refers to an entire understanding of the concept of intelligence and the relationship of it to I.Q." See also, Green, R.K., and Schaffer, A.B., *Forensic Psychology*, Charles C. Thomas, 1984. Scores on a test are meaningless in and of themselves. They are useful only to the extent that their interpretation integrates the idiosyncratic processes that operate to produce that score on a test. "Test results are useful only to the extent that they are interpreted correctly." "No matter how objective and reliable an obtained test score is, it's meaningfulness with respect to furthering an accurate understanding of the person being assessed is a direct function of the integrity and clinical competence of the professional interpreting the score, pp. 49-50. A test that is not reliable cannot be valid because it is essentially measuring error, or variables extraneous to the trait or ability of interests, p. 47. The quality of the test can be diminished or negated, however, if it is inappropriate for the person being assessed or if the test is not properly administered, scored, and interpreted, p. 56.

and guidelines. It was only through the volunteered statements during the testimony of Dr. Lewis that one learns of the student status of M. Feldman. This is important as I cannot offer any reasonable explanation as to why a supervisor would not sign the report (as required) or allow the student to not identify herself as a student (as required) or call into question why the Feldman scores were in marked contrast to other test data generated by qualified members of that team and scores in the records unless the supervisor was not aware of those other scores and history as seems to be the case from Dr. Lewis' testimony. The Feldman scores were from two to three standard errors of measurement deviant from other test scores that were available at the time of Dr. Lewis testimony in New York and the trial and re-sentencing hearing in Florida, December 1990 and February 1991, had anyone looked. The error of measurement of the Feldman test scores was and is beyond the expected area of random error and would suggest that there was a specific, non random, reason for that elevation; I would strongly suspect the reason would be related to the fact that a student provided the results and she had by testimony no supervision on premises, by testimony did not learn of the team members result's, and by testimony did not participate in discussions related to those scores and the history available at that time and at the time of the legal proceedings, and by fact was not provided minimally appropriate supervision. Such "supervision" appears to have been shallow and inadequate at best and perhaps fundamentally negligent.[26]

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[26] "Responsibility for test use should be assumed by or delegated only to those individuals who have the training and experience necessary to handle this responsibility in a professional and

In addition to that, it should be understood that there are some basic reasons why clinicians periodically update tests. It is not so much a question that norms change, it is a question that the underlying population changes across time. It has been known since approximately 1972 that a particular examinee's scores will generally be higher when using older tests and the rate of increase would be approximately .3 points per year due to improvements in nutrition, health, information, communications systems in society, etc.[27]

SUMMARY AND OPINIONS:

1) In reference to the organic brain damage: I noted its presence on Axis III of the diagnostic section of

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technically adequate manner. This standard has special significance in areas such as clinical testing of handicapped people and other such situations where potential impact is great." Standard 6.6, American Educational Research Association, American Psychological Association, National Council on Measurement in Education, *Standards for Educational and Psychological Testing*, American Psychological Association, Inc., 1990. It is noted that similar standards were in existence in 1981, I can provide them if requested. See also the Association For Advanced Training In The Behavioral Sciences, *Test Construction and Psychological Assessment*, Association For Advanced Training, 1989 and the American Psychological Association, *Standards For Educational And Psychological Testing*, American Psychological Association, 1985, Standard 6, "When test standards are not met in test use, great impact on the test taker can result, the greater the impact, the greater the need to satisfy relevant standards." "Wherever a psychological service unit exists, a professional psychologist is responsible for planning, directing, and reviewing the provision of psychological services." Committee on Professional Standards, Board of Professional Affairs, *General Guidelines for Providers of Psychological Services*, American Psychological Association, Inc. 1990.

[27] See for example, Matarazzo, J.D., 1972, *Wechsler's Measurement and Appraisal of Adult Intelligence, 5th. ed.*

this report. I do not believe that on the narrow issue of mental retardation any further work needs to be done as brain damage can provide an explanation or partial explanation for the retardation. It is not necessary to have such an explanation. In thirty to forty percent of the cases of mental retardation, the underlying cause or etiology is unknown. Please see the enclosure, Mental Retardation, Forensic Analysis. However, if the issue is broadened through revisiting of sentencing, for example, then I wold specifically request that a comprehensive neuropsychological evaluation be done along with neuro imaging. Both should offer significant information in those contexts.

2) I would request that the medical staff at UCI provide a medication reevaluation of Mr. Hall to see if some adjustments might be of benefit.

3) Throughout this report I have referenced Fla. Stat. 921.137 along with diagnostic criteria contained in the current DSMIV-TR. While it is understood that the standards and threshold to be met are statutorily defined and not controlled or defined by clinical treatises, the DSM system is referenced for reasons of standards of practice and process. Parenthetically, as is often the case, the statutory criteria is more restrictive and narrow than the diagnostic criteria. In Florida, it is possible to be diagnosed with mental retardation but not be eligible for the benefits bestowed by 921.137. Those examples and discussion are beyond the scope of this report but are mentioned here as Freddie meets criteria for both schemes.

4) Additionally, I have referenced Fla. Stat. 393.063(42), Developmental Disabilities, as Fla. Stat. 921.137 was clearly referenced to and made consistent with the prevailing statute dealing with the mentally retarded in Florida. This makes complete the services and protections of Florida's mentally retarded population. The two statutes are virtually identical, 393.063 has been the guiding policy and criteria for Florida's citizens for a number of years.

5) Respecting the referral question; it is well within a reasonable degree of clinical certainty that using the appropriate instruments specified in the rules of the Department of Children and Family Services that Mr. Hall is Mentally Retarded within the meaning of Florida Statute 921.137. He has a significantly subaverage general intellectual level of functioning in that his performance is two or more standard deviations from the mean score on an acceptable test(s) and concurrently has deficits in his adaptive behavior in that the effectiveness or degree with which he met and meets the standards of personal independence and social responsibility expected of his age, cultural group, and community was and is both severely and significantly deficient. It is understood that those measured levels of deficits are also at least more than 2 standard deviations below the mean even though in relationship to the adaptive levels it is only necessary that they be "deficit." It is not necessary that they are deficit within any particular level of standard deviation. Freddie's adaptive deficits are across the board and found in every area listed in the Vineland Adaptive Behavior Scales as well as those listed in 42 United States Code Annotated, Section 6001(7), P.L.95-

602, and eleven of the eleven areas listed in DSM-IV-TR Please see the enclosure, Mental Retardation, Forensic Analysis.

6) Finally, I think a few comments are in order regarding the Court's attempt to grapple with the concept of "age" at the time of the offense as a Statutory Mitigator and also age, mental age, and mental retardation as part of the analyses for Non Statutory Mitigators. The Court "reduce the chronologic age of the defendant by thirty-three percent (33%).....the defendant would still have a chronological age of approximately twenty-two at the time of the crime."[28] The issue was *not* chronological age. The issue was mental age. Reducing a chronological age to get a chronological age is not only irrelevant but misleading and simply incorrect. The issue was and is mental processing not physical development. After reading the entire transcripts I do not think the Court had any meaningful information, and said so itself, on the nature of intelligence, mental age, developmental differences between cognitive patterns of children versus adults, etc. It appears that the Court incorrectly thought that intelligence, mental age, cognitive processing, etc. tracked and followed physical development and physical maturation; a common mistake. The defense attorney clearly had no idea what these issues were. Trying to divine intellectual level or mental age from a proration or proportional division of chronological age is unheard of. If you look at the intellectual levels, mental age lev-

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[28] Findings Of Fact For Sentencing Order, February 21, 1991, pp. 18 +.

els, of a twenty two year old you find they are virtually identical to those of a thirty three year old person and in fact those are only approximately two points different than those found in a forty four year old person.[29] Choosing a twenty two year old and believing you are respectfully lowering the cognitive threshold is unfounded. That rational would support the conclusion that if you had a particular mental age or intellectual level at age twenty two then as your age increased by thirty three percent to thirty three, your mental and intellectual level would follow and also increase by thirty three percent. The child would not get smarter with advancing chronological age; similarly, lowering an adults chronological age of thirty three to an adult chronological age of twenty two does absolutely nothing to mental age, etc. of the person which was the issue the Court was considering. The issue with age, both statutorily and non statutorily is mental age, developmental age, cognitive processing age not chronological age as the Court stated and discussed.

Actually, you could have a fourteen year old with an IQ of 150. All things being equal, the IQ of 150 would stay stable regardless of advancing chronological age. Conversely, in Mr. Hall's case the records are very clear and were there for all to see, if

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[29] A quick glance, for example, at the tables for the various age groups found in the WAIS-III Administration and Scoring Manual will confirm what I am talking about. There is no difference. The Court's reduction to a lower chronological age did nothing but mask and hide the true nature of Mr. Hall's disability. Once again, I do not fault the Court. The Court simply had nothing with which to work.

the attorney had known what to look for. In 1955 Mr. Hall had a mental age of an 8 year 10 month old child; he was found to be mental retarded in 1958 and 1959 which could have been calculated to be a mental age of an 8 or 9 year old child; in 1968 Mr. Hall had an IQ equal to a normal child of about 9 years of age even though he was chronologically twenty three years and five months old (this resulted in Mr. Hall's being mentally retarded again); in 1968 and 1969 Mr. Hall had a learning level and academic level of an 8 year 6 month to 9 year 8 month old child; in July of 1978 the Florida Department of Corrections determined that Mr. Hall had an intellectual level, mental age level, of an about 9 year old child and had a learning and academic age of an 8 year 8 month old child; a few months later FDC concluded that Mr. Hall was diagnosed as mentally retarded which would have placed, by criteria, his mental age to be that of an about 9 or 10 year old child; Dr. Bard's comprehensive testing concluded a mental age of a 6 to 11 year old child depending on what cognitive skill you looked at; even M. Feldman's scores can be converted to a mental age of a 7 to 8 year old child; Dr. Toomer diagnosed mental retardation and his Beta score of less than 60 is equivalent to a child of 6 to 7; Dr. Krop in 1991 determined a functional age of 13 and learning age of a 9 year old at a time when Mr. Hall was approximately forty six years old. I wasn't involved at that time but my testing incontrovertibly shows a mental age of a 10 year 6 month old child. Mr. Hall had no meaningful representation on this and related issues. Mr. Hall will continue to function and have the cognitive abilities and capacities of a child that is not even a teenager.

It is unfortunate that the Court was not only given incorrect information but also was not given even the minimum information needed to avoid equating Mr. Hall to a twenty two year old man. As a point in fact, when Mr. Hall was twenty two, the State of Florida determined that he was intellectually, cognitively, and mentally at about a nine year old level. All of this was in the records had they been read and understood.

7) Mr. Hall is mentally retarded.

If I can be of any further assistance, please do not hesitate to contact me.

Respectfully,

/s/ Bill Mossman
Bill E. Mosman, Ph.D., J.D.

Attachments

Enclosures

EVALUATION OF DR. GREGORY PRICHARD

[letterhead and stamp omitted]

CONFIDENTIAL ASSESSMENT

Identifying Information:

Name:	Freddie Hall
DOB:	7/21/45 (Age 57)
Evaluation Dates:	8/14/02; 8/15/02
Report Date:	2/4/03

Referral Information:

Mr. Freddie Hall is a 57-year-old, African American male who was referred to me by Mr. Eric Pinkard, Esquire of the Capital Collateral Regional Counsel-Middle Region. The purpose of the assessment was to determine whether Mr. Hall meets the statutory definition of mental retardation.

Evaluation Procedure:

The following procedures were utilized in the assessment process:

Interview and Mental Status Examination with Mr. Hall

Review of available records, including: Report by Dr. Dorothy Othow Lewis; Report by Dr. Leslie Prichep; Report by Dr. Barbara Bard; Report by Dr. Harry Krop; Report by Ms. Marilyn Feldman; Report by Dr. George Barnard; Report by Dr. Jonathan Pincus; Report by Dr. F. Carrera; Report by Dr. Kathleen Heide; Report by Dr. Jethro Toomer; Report by Dr. Richardson; Report by Dr. Bill Mosman; DOC Records; Court Orders; Transcripts of testimo-

ny by Dr. Barnard, sister Diana Mitchell Rigsby, sister Katie Mae Glenn, brother James Hall; Finding of Fact for Sentencing Order prepared by the Honorable Richard Tombrink, Jr.; Educational Records.

Wechsler Adult Intelligence Scale-3rd Edition (WAIS-III)

Vineland Adaptive Behavior Scales (Interview with sister Diana Rigsby, Interview with brother James Hall)

Wide Range Achievement Test (Blue Form, Tan Form, Combined)

Interview with Diana Rigsby and James Hall

Notification of Confidentiality:

Mr. Freddie Hall was informed as to the purpose of the assessment, and as to the limits of confidentiality. Specifically, he was aware that I was conducting a confidential evaluation at the request of his CCRC attorney, Mr. Eric Pinkard. He understood that results of the assessment would be compiled into a report, and furnished exclusively to Mr. Pinkard. He was informed that this report might be used in court at the discretion of his attorney. He gave me verbal permission to contact family members to procure historical information about him.

Brief Background:

Mr. Hall was born in Wildwood, Florida and raised by his biological mother and father until their separation when he was in grade school. He reported that his mother had seventeen children, but he did not know all of his siblings. He stated that he was raised with five brothers and three sisters. One sister was shot and

killed in 1975, and a brother was also shot and killed in 1957. Both of his parents are deceased.

He indicated that he grew up in conditions of extreme poverty. He and his siblings rarely had enough to eat, and had to wear the same clothes day after day. He also stated that every child was expected to work picking fruit and vegetables beginning at the age of six. His mother was the primary disciplinarian, and beat Freddie and his siblings severely. He also stated that other families in their neighborhood were allowed to discipline him, and often did so in a harsh manner. His mother drank heavily when he was a child, and his father was physically ill. He characterized his young life as "hard".

He began public school in approximately 1951 at the age of six. He was retained after his 2nd grade year. School records indicated that he had a very difficult time academically. Comments from his school guidance counselor in 1952 (age 7) included, "His mental maturity is far below his chronological age." In 1953 (age 8) a note read, "I have found Freddie to be very inattentive and extra slow in comprehension". In 1954 (age 9) it was stated that, "He is slow in all of his work". In 1955 (age 10) he was characterized as, "Mentally retarded." In 1956 (age 11) it was again stated that, "Freddie is slow in all phases of work". In 1957, 1958, and 1961 (ages 12-16) he was again characterized as, "Mentally retarded" by school counselors. His Elementary school grades reflected Cs, Ds, and Fs in the vast majority of classes between 1st and 6th grades. Middle school (7th and 8th) included recorded grades of one D and eleven Fs. High school grades were reflected as Ds and Fs in all classes before he dropped out in the 11th grade.

His family reported that he was socially promoted because he was a good athlete. This was corroborated in a DOC Classification and Admission summary dated 12/24/68. In the social history section, it was stated that "the principal indicated that the subject did not make good grades and for the most part was socially promoted in order that he could play football". In this same document, a Parental Questionnaire filled out by his mother indicated that Freddie did not make normal progress in school because he "couldn't learn". In fact, after dropping out of school in the 11th grade, Freddie was illiterate, unable to read or write. He has not obtained his GED.

Freddie has never been married, but did live with two women for over a year. He does not have any children. He has never lived on his own. He stated that he either lived with his mother, his girlfriend, or stayed with other family members.

Occupationally, he worked primarily as a fruit picker. His siblings stated that he was a hard worker, but could not hold a job for very long. They said he would get frustrated and quit, and lacked the communication skills to resolve conflicts with his employers. The Parental Questionnaire from his 1968 DOC admission reflects that his mother recognized his employment difficulties. She commented that he had no job for greater than six months, as he, "Would get mad and quit." Dr. George Barnard, in his assessment of Mr. Hall in April of 1978, also stated that, "The longest he held a job was six months...". Furthermore, he was never able to obtain a driver's license because he could not pass the driving test related to his illiteracy. This made it difficult for him to get to and from work at times.

Family members also commented that he was poor managing money. They stated that he would give his money away in the interest of being liked by others, and also would gamble until all of his money was gone. His sister, Diana Rigsby, said he was "easy pickings" while gambling because others could deceive him and take his money even if Freddie actually won. She said he just "didn't understand."

He was screened for military enrollment in 1965, but was classified as 4 F because of a very low score on a mental examination. A Pre-Sentence Investigation report dated 12/20/68 indicated that Freddie "...appears to be functioning on below normal level as was socially promoted in school and classified 4-F for intelligence purposes".

He reported significant use of alcohol in the 60s and 70s. He stated that it was just part of his environment. He also reported using some marijuana. He denied use of other chemicals.

He has had no previous psychiatric admissions, although there are many references to some psychiatric disturbance. His mother apparently believed in voodoo, and Freddie also communicates a belief in "root doctors" and "spirits". Two of his sisters mentioned that Freddie needed psychiatric help as a child, and they tried to convince their mother of this. However, she attributed his behavior to "spirits" and "spells", and would not take him for help. Freddie still reports experiencing "visions" and other unusual perceptions. Some form of psychiatric illness is likely present.

Criminal history includes a conviction in 1968 for rape. He received a 20-year sentence, and was paroled in

1973. He is currently on Death Row for conviction on charges of 1st Degree Murder, which occurred in 1978.

Medical history includes multiple prior head injuries. He stated that he boxed a great deal in his youth, and received several blows in this context that resulted in loss of consciousness. He also lost consciousness in 1963 when he hit his head in a car accident. He fell out of a tree at the age of approximately five and lost consciousness as well. He was hit with an iron pipe in 1975 and lost consciousness again. He has no other significant medical problems.

Mental Status Examination:

Mr. Hall presented for the evaluation as a tall, stocky African-American male who appeared younger than his chronological age. He wore prescription eyeglasses and had very short hair. His overall level of grooming and hygiene was fair. He was oriented as to person, place, time, and date. His memory for immediate, recent and remote events was fair. Attention and concentration capacities were adequate for conversational purposes. He did not appear to be distracted either by internal or external stimuli. His ability to abstract was poor. His judgment and insight was fair. Intellectually, he was estimated to be functioning in the mildly mentally retarded range before testing. Speech productivity was reduced. He spoke slowly, with a low and raspy voice, and appeared dull. Furthermore, he was difficult to understand at times due to poor enunciation and articulation. Thought productivity was reduced as well. He offered very little spontaneous information, and had a difficult time making his point in a cogent manner. His answers to questions were concrete in nature. Consequently, he had to be questioned a great deal to procure

thorough information about various historical matters. When questioned about hallucinations and delusions, he communicated his belief in spirits. However, no overt psychotic process was evident. He denied the presence of suicidal or homicidal ideation. His mannerisms, gestures, and facial expressions were consistent with a blunted, dull emotional presentation. He indicated that both his sleep and appetite has been okay.

In summary regarding his mental status, Mr. Hall presents as a man with significantly subaverage intellectual abilities. He is generally dull in his emotional and cognitive repertoire, and has a difficult time communicating in a cogent and thorough fashion. He appears to have a speech impediment that manifests in poor enunciation and articulation. While he reports experiencing "visions", there was no overt evidence that he is impaired by the experience of psychotic misperceptions.

Information from Collateral Sources:

Ms. Diana Rigsby was interviewed. She is Mr. Hall's older sister, born in 1937. She indicated that she was responsible for taking care of Freddie often when they were young. She was the oldest child in the home, and was assigned the task of attending to her younger siblings when their parents were busy, which was often. I asked her whether Freddie began walking and talking at expected ages and she stated, "I know he was slow in talking. Walking he was better." She elaborated by stating that Freddie stuttered, and was "very slow learning how to communicate." She described that Freddie had "problems learning". She stated that he could not read or write, and as a result could not make any progress in school. She said that she tried to help Freddie learn, but that he just didn't "catch on." She

described that of their mother's seventeen children, eleven of them were raised together. She stated that of these eleven, "he (Freddie) was the only one who really had a problem." She said he was "mentally retarded in school. He was socially promoted cause he was a good football player." She added that it was "always hard for Freddie to understand. He has the mind of a child. Always was hard for him to talk with people and learn. But he was a good worker, picking beans and berries and oranges. He couldn't get a job like at McDonalds but could get fruit picking jobs." She stated that he also helped picking produce around their house. She said that he was good at that, but "couldn't work as fast and hard as the rest of us." She further described that he was "easily led". She said he would hang around people that "praised him, helped him feel wanted and that he belonged." She said that people "took advantage of him because of that all the time. If you were nice to Freddie he would give you anything you asked for. He would more or less give all his money away to so called friends, and then borrow from me or somebody else." She conveyed that he never lived on his own. She described that he needed help with finances, and domestic chores. She said he lived with their mother, or girlfriends, or other family members. She indicated that his girlfriends liked having him around because "he was a hard worker and gave them the money he earned. They basically used him for that." She stated that, as an adult, Freddie would "get lost in conversation." She said he "does much better talking with children. Young children under age twelve." She said he used to come by her house every day as an adult. She indicated that he would barely speak to her, but would instead "play with kids or watch television with kids. He would talk to them; most of his conversations were with children.

He could communicate much better with them." Finally, she stated that Freddie attempts to write letters from prison from time to time. She said that she still cannot understand what Freddie is trying to say in spite of the fact that his writing is much better now. She said he has learned most of his writing skills in prison, as he wasn't ever able to write at all prior to his most recent incarceration. She said he still does not know his ABCs.

Ms. Diana Rigsby also provided a deposition dated 8/23/88, more than fourteen years prior to my conversation with her in December of 2002. Her comments at that time reflect consistency in reporting about Freddie's capabilities as a child. Excerpts from this deposition included the comment that "...we soon realized that something was very wrong with Freddie Lee. It took him longer to learn to walk and he had great difficulty forming his words. When he did learn to talk, he stuttered so bad that it was difficult to understand him." She also stated that "Freddie Lee's school performance confirmed our suspicions that he was mentally retarded. He was never able to learn to read or write and eventually the teachers gave up on him and passed him from one grade to another. School was so frustrating for him that he frequently ran away when his teachers chastised him or when kids teased him." Finally, she stated that "I had hoped to protect Freddie Lee from the outside world. Even though he was full grown, mentally he was a child."

Mr. James L. Hall was interviewed. He is Freddie's older brother, born in January of 1939. He spent a lot of time with Freddie growing up. He stated that Freddie was, "different than the rest of us. He couldn't understand like the rest of us. He couldn't understand or

cope with things like the rest of us could. We understood him but others couldn't, mentally that is." He stated Freddie "was slow. Wasn't smart at all. He was slow learning in school." He elaborated by saying that "Educationally he wasn't good. Couldn't do no reading and writing. I have a hard time reading his letters now. He just now learned to read and write a little in the prison he is in." He described that, growing up, "all of us kids were close. We took care of Freddie. We loved him and understood him the way he was." He conveyed that he "recognized early that he was slow and needed help," but that "nobody got him help. We didn't have the resources. Daddy couldn't support us. I had to work to help support the younger ones." When Freddie got older, Mr. James Hall stated that "He always depended on us for support, even when he was older. We all hoped he would make it. He had a narrow ability of handling things and taking care of himself." He described Freddie's communication skills as quite poor. He stated "He could talk with me but not a man to man talk. It wasn't no good conversation. It was like talking to a child, that is how you had to talk to him." Finally, he stated that Freddie, "couldn't understand and handle things like the rest of us. A lot of people take advantage of him that way."

Mr. James L. Hall also provided a deposition dated 8/23/88. His comments at that time, more than fourteen years before my interview with him, reflect consistency in reporting Freddie's functioning as a child. Excerpts from that deposition included James Hall stating that, "I have always been concerned about my younger brother because I believe he is mentally retarded. I always felt that Freddie Lee would have a hard life because of his limited ability. Freddie Lee's problems started at the beginning of his life..." He followed with,

"As Freddie Lee was growing up, we noticed that his behavior was unlike other children his age. Freddie Lee was slow in doing everything. He could not talk for a long time and always had difficulty pronouncing his words." Mr. James Hall also conveyed that, "While I overcame the adversity of my young life, getting out on my own as soon as possible, Freddie Lee hung around home. He never really grew up and acted child-like and appeared to be in his own world most of the time." Finally, he indicated that, "Although Freddie Lee was able to work a job, he had no idea what to do with his money...he squandered his paycheck gambling or gave it away to so-called friends. Everyone in town knew Freddie Lee was easily influenced and gullible."

Results of Past Testing and Professional Commentary:

Results/observations from past assessments communicated in his records included the following.

School Records reflect comments from guidance and counseling in 1952 (Age 6-7), "His mental maturity is far below his chronological age." In 1953 (Age 7-8), "I have found Freddie to be very inattentive and extra slow in comprehension." In 1954 (Age 8-9), "He is slow in all of his work." In 1955 (Age 9-10), "Mentally retarded." In 1956 (Age 10-11), "Freddie is slow in all phases of work." In 1957 (Age 11-12), "Mentally Retarded". In 1958 (Age 12-13), "Mentally Retarded". In 1961 (Age 15-16), "Mentally Retarded".

A DOC Pre-Sentence Investigation report dated 12/20/68 (Age 23) indicated, "no record of any emotional disturbances, but appears to be functioning on below normal level as was socially promoted in school and classified 4-F for intelligence purposes."

Florida Division of Corrections Psychological Screening Report dated 12/23/68 (Age 23) reported a Beta IQ score of 76, a Literacy Reading Level of grade 2.6, with a relative grade equivalent of 2nd.

A DOC Educational Counselor Report dated 2/11/69 (Age 23) indicated a Reading Level grade equivalent of 2.6, an IQ score of 76, and a Grade Placement of 3.8 on the California Achievement Test. Commentary included, "He is capable of learning but I do feel his progress will be rather slow especially in the academic portion of his training program."

DOC Social History dated 2/13/69 (Age 23) in the Military History section it is stated that "...was classified as 4 F in 1965 because of a very low score on a mental examination." In the Team Recommendations section it is conveyed that "The Subject expresses some interest in an academic program, but does not seem to be well qualified for such." It further concludes that, "The subject has expressed some interest in an educational program. He has a Beta IQ of 76 and would not seem to be well qualified for an academic program, but he has a reading level of 2.6 and any improvement would be desirable."

Memorandum for Vocational Coordinator in DOC dated 8/22/69 (Age 24) conveyed that, "I am doubtful we will be able to be of a great deal of help to this man (IQ 68 etc.) but we will certainly try."

Department of Corrections Psychological Screening Report (not dated but stated that Mr. Hall was 24, 1969) indicated that intelligence was "inferior". Reading Level grade equivalent was 2.6. Psychological Observations described Mr. Hall as "This individual shows

characteristics of cultural, social, economic, affectional, and intellectual deprivation. He seems to be very inadequate and seems to lack the ability to adequately cope with the more complex factors of his environment. He seems also to lack the capacity to reason through to logical conclusions problems of day to day living thus having a tendency to act out rather than to come to logical conclusions"..."Generally speaking this individual does not seem to show any gross psychopathology, however, he does show characteristics which indicate a very inadequate personality and an individual who is almost a stereotypy which you would expect to come from 'culturally inadequate environment'".

In an evaluation by Dr. George Barnard dated 4/22/78 (Age 32) no formal testing was conducted. However, Dr. Barnard commented that, "He is judged to be of average intelligence." An Affidavit of Dr. George Barnard dated 8/21/88 appears to retract this original judgment. Dr. Barnard comments that, "In addition the materials I reviewed reflect a childhood of material impoverishment and physical abuse. These materials also reflect that Mr. Hall's level of intellectual functioning is lower than the clinical assessment noted in my original report." Dr. Barnard also discusses Mr. Hall's history of multiple closed head injuries with loss of consciousness, coupled with substance abuse which, "...may contribute to brain damage."

Dr. F. Carrera assessed him on 4/22/78 (Age 32) but administered no formal testing. He commented that, "Immediate and short-term memory were moderately impaired...he was able to do mental problems fairly well; intelligence is average."

DOC Confidential Evaluation dated 9/13/78 (Age 33) reports "Subjects prison record appeared fair, showing little signs of self-improvement. Subjects' intelligence quotient would be considered borderline retardation in intellectual ability."

DOC Psychological Screening Report dated 1/10/79 (Age 33) indicted a Kent IQ of 79-Borderline Intelligence, with a Reading Grade Level of 2.8 and Social Difficulties of "Illiteracy".

Dr. Barbara Bard assessed Mr. Hall on 9/8/86 (Age 41). Results of testing utilizing the Woodcock Johnson Psychoeducational Battery indicated that, "The only score which even approaches an adult level is one which has nothing to do with formal schooling, the Spatial Relations subtest...Mr. Hall's skills on this exercise are those of a child in the middle of the sixth grade." Further, she stated that "all other subtests ranged from a grade level score of 0 to one of 4.7. Those which represent the ability to read and understand what has been read are representative of an almost total illiteracy...His math abilities are so low as to be below the first grade level. He did not get a single example correct on a test instrument which began with material on a pre-kindergarten level." In her Summary and Conclusions section, she stated, "Mr. Hall is an illiterate adult. His mathematical abilities are virtually nonexistent. He is probably incapable of even the most basic living skills which incorporate math and reading such as understanding and paying a bill, writing a check, or keeping a checking account...His speech is often incomprehensible and his use and understanding of language is no better than a nine year olds. His skills are so rudimentary that the assessment of whether or

not he has a specific learning disability is difficult to make."

Evaluation by Dr. Dorothy Othow Lewis dated 9/10/86 (Age 41) in conclusion section of her Neuropsychological Evaluation states, "Mr. Hall is a chronically psychotic brain damaged individual, with severe learning disabilities." Her interpretation included that, "His speech was slurred and difficult to understand. It also became evident during the testing session that his receptive language was equally poor." Finally, she stated that, "The profile of scores obtained on the Halstead-Reitan battery are characteristic of patients with serious brain impairment."

Evaluation by Ms. Marilyn Feldman dated 9/10/86 (Age 41) she reported, "On the WAIS-R, Mr. Hall achieved a Verbal IQ score of 77, a Performance IQ score of 85, and a Full Scale IQ score of 80, placing him in the borderline/low average range of intellectual functioning." In spite of this finding, she commented in the Test Behavior section that "He was open but quite limited in his capacity for meaningful interaction. His comments were sometimes simple and childlike and only tangentially related to test stimuli." Further, she conveyed that, "Mr. Hall's reproductions of the designs on the Bender-Gestalt were done poorly and are suggestive of organic impairment"..."His performance on the memory portion of the test was extremely impaired." She described Mr. Hall as, "He is dependent and helpless, and feels lowly and contemptuous in a depriving world that has offered little nurturance."

Evaluation by Dr. Leslie Prichep dated 9/15/86 (Age 41) indicated, "This is a moderately abnormal neurometric exam."

Dr. Jonathan Pincus performed a Neurological Examination of Mr. Hall with a report dated 8/22/88 (Age 43). He stated that, "This patient shows evidence of poor memory and probable retardation...I suspect he is mildly retarded and brain damaged." Additionally, in a document dated 10/18/90 (Age 45) there are notes referencing an interview with Dr. Pincus. Interview notes reflect that Dr. Pincus indicated, "One of the reasons he did not take a history was subject's inability to understand the questions posed...Subject couldn't answer the simple questions, he understood in a simple manner. Subject's speech very difficult to understand...Dr. feels subject is mildly retarded. This opinion is based on subjects dull responses."

Dr. Jethro Toomer submitted a Psychological Evaluation dated 8/22/88 (Age 43). He noted that, "...it was extremely difficult to understand him as his speech was impaired and pronunciation of a number of words faulty." Dr. Toomer characterized Mr. Hall as, "He has little insight into the motives for his behavior. His judgment remains immature, juvenile, and his ability to reason abstractly and discriminatively is severely impaired." Testing results utilizing the Bender Gestalt included the interpretation that, "Protocol results also indicate the presence of organicity and acutely low intellectual functioning. Further testing would reveal the extent and nature of this organic disturbance, and would no doubt be congruent with earlier reports of brain damage." Other testing results included, "Responses to questions selected from the verbal reasoning section of the Wechsler Adult Intelligence Scale were largely concretistic and inadequate." Responses to abstractions were characterized as, "This tends to be a concrete answer, missing the abstract point and obviously presenting difficulty in this area so that the pro-

jection of consequences and the ability to deal with abstract material is impaired. This is consistent with his impaired mental functioning." Dr. Toomer concluded by stating that, "He functions in the mentally deficient range of intelligence, shows signs of mental illness, as well as organic brain dysfunction", and "Mr. Hall suffers from an extreme mental and emotional disturbance, severe impairment of cognitive functiong, organic brain damage." Finally, he stated that, "His history is characterized by poor school achievement, poor socialization and a poor environment incapable of providing sufficient nurturing. He is unable to reason abstractly, and discriminatively or to project consequences and his level of mental functioning is characterized by being easily influenced."

In a letter from Dr. Harry Krop dated 3/16/90 (Age 44), he indicated that "Mr. Hall was cooperative, although he was extremely difficult to understand. Psychological testing reveals low Borderline functioning (IQ=73), significant memory deficits and an obvious learning disability. Previous testing and the current evaluation also indicate organic brain damage." In Dr. Krop's subsequent full psychological report dated 1/8/91 (Age 45), he relates that, "Mr. Hall had an extreme speech impediment when he was younger and had difficulty being understood." During his assessment, Dr. Krop added, "During both interviews, it was difficult to understand Mr. Hall because of his severe speech impediment." He stated that, "This individuals social skills were quite primitive and his affect was depressed." He observed that "His thinking was very concrete and he showed almost no insight into his emotional problems. Memory processes were impaired as was his judgment." Dr. Krop administered intellectual testing utilizing the WAIS-R. He obtained a Verbal IQ score of 70, a Per-

formance IQ score of 79 with a Full Scale IQ score of 73 and conveyed that, "...Mr. Hall appeared to exert maximum effort...". Interpretation of his testing results included that "...obtained results appeared to be a valid estimate of his true intellectual ability. Mental age for Mr. Hall is thirteen years. He reads at less than the third grade level. Memory processes on all tests are impaired and the results of the neuropsychological testing in general indicate perceptual motor deficits, orientation deficits and aphasia in different areas...both verbal and visual memory functioning was impaired." Dr. Krop offered the following conclusory statements. "The results of this evaluation reveal significant cognitive deficits..." Deficits included, "Functional Retardation", "Mr. Hall is functioning at an age level (mental) of thirteen years", "Mr. Hall suffers from a severe speech impediment which resulted in limited social skills and an impaired self-concept", and "coping skills are extremely inadequate and ineffective."

Dr. Kathleen M. Heide submitted a psychological report dated 10/6/90 (Age 45). She observed that "Freddie has a speech impediment which made it difficult at times for this examiner to understand him." She added, "His answers were also typically concrete and restricted, which was more indicative of his level of personality development and cognitive ability than of an unwillingness to answer." She concluded that, "His capacity was diminished largely because of his limited cognitive ability and his restricted personality development", and "He had not reached the stage of development that the criminal justice system assumes adults will function at."

Dr. Bill E. Mosman conducted an evaluation of Mr. Hall with a report submitted November 19, 2001 (Age 51). Dr. Mosman assessed Mr. Hall utilizing the WAIS-III

and obtained a Verbal IQ score of 73, a Performance IQ score of 70, with a Full Scale IQ score of 69. The Leiter Adult Intelligence Scale was also administered, yielding a Verbal IQ score of 55, a Performance IQ score of 47, with a Full Scale IQ score of 52. The Slosson Intelligence Test Revised resulted in a mental age equivalent of a 10 year 6 month old child. The WRAT-III results suggested general functioning consistent with a first grade child, or about seven years of age. Vineland Adaptive Behavior testing was also conducted, yielding an Adaptive Behavior Composite score of 51. Dr. Mosman diagnosed Mr. Hall as Mildly Mentally Retarded, with concurrent diagnoses of Reading Disorder, Mathematics Disorder, and Disorder of Written Expression. He concluded that "...the primary mental disorder/disability that Mr. Hall has is Mental Retardation which by definition, existed during childhood, his developmental years, and manifested with then existing concurrent deficits in adaptive functioning and measured subaverage levels of intellectual functiong. This has held true throughout his entire life and because Mental Retardation "isn't cured" will be there until the day he dies."

Results of Current Testing:

Mr. Hall was administered the Wechsler Adult Intelligence Scale-3rd Edition during my current assessment of him. Conditions were appropriate for testing and he appeared to be making an effort to do well so results should be considered valid. On this administration, he earned a Verbal IQ score of 74, a Performance IQ score of 73, with a Full Scale IQ score of 71. All Full Scale IQ scores are approximate, as it is necessary to take into account measurement error. Hence a confidence interval is constructed around the obtained (approximate)

score to get the true intellectual level that falls within this range of scores. Given his approximate score of 71, it can be stated with 95% level of confidence that Mr. Hall's true intelligence quotient falls within the 68-76 range. This is equivalent to a percentile rank of 2, and falls approximately two standard deviations (SD = 15) below the mean (mean = 100).

The determination of Mental Retardation is a two-pronged process. The person must have significant deficits in both intelligence and adaptive skills. Hence, the Vineland Adaptive Behavior Scales (Interview Edition) were administered by interviewing relatives familiar with Mr. Hall's skill level historically to assess the second prong of Retardation.

Ms. Diana Rigsby was considered a reliable and appropriate respondent. She spent a lot of time with Freddie growing up, having the responsibility of caring for him a lot of the time as his older sister (8 years his senior). She appeared to have a good recollection of his skill level. I questioned her with items from the Vineland using the age reference of 15 years old. That is, she responded to Freddie's skill level during the time when Freddie was 15 and she was 23. This was the last year they were in their mother's house together in 1960. I utilized the normative reference in the Vineland Manual Ages 14-0-0 through 14-3-30, to ensure a conservative estimate of his adaptive functioning at that time. Hence, his scores potentially reflect an overestimate of his functioning in adaptive skills rather than an underestimate. On this administration, his Standard Score for Communication was 39, for Daily Living was 48, and for Socialization was 52. His Adaptive Behavior Composite score was 43. Again utilizing a confidence interval for an approximate score of 43, it can be stated at

the 95% level of confidence that his true adaptive skill functioning for the domains measured falls between 33-53. These results suggest adaptive behavior in the mentally deficient range, consistent with mental retardation.

Additionally, I performed a second Vineland Adaptive Behavior interview with Ms. Diana Rigsby addressing Freddie's adaptive skills after the age of 18. She indicated that Freddie came to her house almost every day to get something to eat, and generally watched television with the children in her home. She appeared to have a very good recollection of Freddie's skill functioning at that time. I utilized the age reference of 18 or older, and the same age reference in the Adaptive Behavior Manual. She indicated that Freddie was between 28-33 at this time, having been released from his first prison sentence. On this administration, he earned a Standard Score on Communication of 26, on Daily Living of 58, and on Socialization of 46. His corresponding Adaptive Behavior Composite score was 41. Establishing the 95% confidence interval around this composite score indicates his adaptive skill level in the areas measured was between 33 and 49. This finding is consistent with Mental Retardation.

Mr. James L. Hall was considered a reliable and appropriate respondent. He was an older brother of Freddie (six years his senior) and spent a lot of time with him growing up. James Hall moved from his mother's home in his late teens, but saw Freddie on a regular basis while they were both in their twenties. James Hall described that he provided Freddie with a ride to work often when Freddie was between 20-23, before he went to prison for the first time. Freddie also spent some time at James' house. I questioned him with items on the Vineland using the age reference of 18 years old or

older, and utilized the same normative reference in the Adaptive Behavior Manual. On this administration, his Standard Score for Communication was 25, for Daily Living was 60, and for Socialization was 43. His Adaptive Behavior Composite score was 39. Hence, it can be stated at the 95% level of confidence that his adaptive skills for the domains measured falls between 31-47. These results suggest adaptive behavior in the mentally deficient range, consistent with mental retardation.

Finally, I administered the Wide Range Achievement Test-3rd Edition (WRAT-III). This test measures basic skills of reading, spelling, and arithmetic and correlates highly with IQ. His results on the combined analysis from the Blue and Tan forms were Standard Scores of 51 on Reading, 63 on Spelling, and 54 on Arithmetic (Mean of 100, SD of 15). Confidence Intervals at he 95% level were 45-67 for Reading, 55-71 for Spelling, and 46-62 on Arithmetic. These findings suggest a 1st-2nd grade level of skill, and are consistent with a finding of deficiency in the mentally retarded range.

Conclusions:

An extremely important past finding related to Mr. Hall is clearly stated in the Finding Of Fact for Sentencing Order, prepared by the sentencing Judge in Freddie's original case, the Honorable Richard Tombrink, Jr. (dated 2/21/91). He identified potential mitigators raised in Freddie's defense. Of these was included the issue of whether "Freddie Lee Hall has been mentally retarded his entire life." The commentary from Judge Tombrink, Jr. related to this issue included:

> "There is substantial evidence in the record to support this finding. Again, however, there is difficulty in relating this factor back to determine how it affected the defendant's state of mind at the time of the crime. The mitigating factors of this ***fact*** (emphasis added) are thus unquantifiable."

Hence, established as fact by Judge Tombrink, Jr. at the time of his sentencing order was substantial evidence to support the presence of mental retardation during Mr. Hall's entire life. While this issue was factually established in Judge Tombrink, Jr.'s ruling, its contribution to the mental state of Mr. Hall at the time of the crime was not. Thus it was considered "unquantifiable" as a mitigator in the crime. However, while his mental retardation could not be demonstrated to have had a mitigating affect on his culpability for the crime, the ***fact*** remains as established in Judge Tombrink Jr.'s sentencing order. That is, that "substantial evidence in the record" is supportive of the presence of mental retardation in Mr. Hall. Although considered not relevant then, the relevance of this finding in the context of the current issue cannot be refuted. Indeed, there is a plethora of evidence that Mr. Hall has been mentally retarded his entire life. He was slow reaching developmental milestones, could not learn to read or write, was gullible and easily led, communicated poorly, was considered mentally retarded throughout school, failed a military exam because of cognitive difficulties, was considered inadequate and cognitively inferior in DOC, could not obtain a driver's license, demonstrated gross deficits in adaptive skills, and consistently has been characterized as brain damaged, dull, and retarded by the vast majority of professionals who have evaluated him. There is little histori-

cal information that would contraindicate the presence of mental retardation. Results of the current assessment further support that Mr. Freddie Hall meets the statutory definition of mental retardation. His intellectual level as measured by the WAIS-III is significantly subaverage (approximately two standard deviations below the mean of 100), Adaptive Skill level as a child and adult has been impaired (below 70 based on interview with those who knew him best), and the presence of cognitive limitations obviously manifested prior to the age of 18 (school reports, anecdotal data from relatives).

Mental Retardation is a static condition that generally shows little change over the course of an individual's life. Freddie Hall is mentally retarded, has always been mentally retarded, and will be mentally retarded for the remainder of his life.

I hope these results are useful. If I may be of further service, do not hesitate to call.

Respectfully,

/s/ Greg Prichard, Psy.D.
Greg Prichard, Psy.D.
Licensed Psychologist

STATE OF FLORIDA)
) ss:
COUNTY OF ALACHUA)

AFFIDAVIT OF DR. GEORGE W. BARNARD

I, GEORGE BARNARD, first being duly sworn, depose and say:

1. I am a board certified forensic psychiatrist, professor, chief of the Consultation Service, and chief of the Forensic Division of the Department of Psychiatry of the University of Florida. I have conducted well over 4000 forensic evaluations in my career, have been qualified as an expert by numerous courts, including numerous Florida Circuit Courts, and have testified in many judicial proceedings.

2. I had occasion to interview and evaluate Freddie Lee Hall on April 22, 1978, in relation to his trial for first first degree murder. Specifically I was asked to evaluate Mr. Hall's competency to stand trial and his legal sanity at the time of the offense.

3. I was never asked to evaluate Mr. Hall's mental state and background with regard to mental health evidence which may have been considered as nonstatutory mitigation of sentence at any time prior to or at Mr. Hall's trial.

4. Had I been asked to formulate and provide an opinion in this regard, there certainly existed important mental health nonstatutory mitigating evidence of which I was aware at the time and regarding which I would have been more than willing to testify. My original report in fact made reference to some of the nonstatutory mitigating evidence of which I was aware and

with regard to which I could have provided expert testimony. In that report I noted:

> On the day of the alleged crimes he [Mr. Hall] had almost a pint of Apricot Brandy, with Ruffin drinking part of a cup. Hall also took two pills from Ruffin that day, but did not know the kind of pills they were.
>
> * * *
>
> He was born July 21, 1945, in Wildwood, Florida. His mother is seventy-two years of age, his father died in 1963 at age seventy-two. His parents were separated when he was a boy, but he did not know how old he was at that time. He was sixth in a sibling group of six. He had one sister who was murdered by a man she had some children by. He was raised by his mother and got along well, and never ran away from home.
>
> He quit school in the eleventh grade at age sixteen or seventeen. He had failed the first grade because he was slow. He did learn to read and write, and had no special education classes. he was suspended once for playing cards. He got along with the teachers and students.
>
> * * *
>
> He has been unconscious several times while boxing or playing football. The longest period of unconsciousness was not more than a few seconds. He denied fits, convulsions, or seizures. He has had the venereal disease, Clap, numerous times, and was always treated. He has thought of suicide but has made no attempts. He never been a patient in a state mental hospital and has had no psychiatric treatment other than seeing a

> psychiatrist several time while in prison. He did not receive any medications at that time. As a child and again in 1967, he had the experience of being unable to move for several seconds, and in 1967 he saw a vision with three men when there was nobody there. He has had no other experiences like this.

5. As stated, Freddie Hall's history of head trauma and head injury, which I noted at the time of my original report, may be relevant to findings of brain damage as discussed below.

6. In my original report I noted that "There are mild deficits in his recent memory but his remote memory appears intact." It has been recognized in the profession that brain damaged individuals will evidence deficits in recent memory, as opposed to remote memory. Such indicia, along with other indicia that I noted in my original report, indicate that Mr. Hall may have been brain damaged. A hypothesis of brain damage is supported by his history of closed head injuries. As I noted above and in my original report "he has been unconscious several times while boxing or playing football".

7. It has been recognized in the profession that repeated trauma to the head can cause permanent damage. Individuals with such damage may suffer from difficulty with impulse control, emotional lability, mild paranoia, and slowness of thought.

8. In addition to these head injuries, Mr. Hall has a history of drug and alcohol abuse. In my report I also stated:

> He began the use of alcohol at age twenty-eight. He estimated that he drank daily if it was available, and guessed he may have a quart

of beer plus a couple of ounces of whiskey when he could get it. He denied shakes, dt's, blackouts, or treatment for alcohol abuse. He began the use of drugs at age twenty-eight. He has used pot, black beauties, and speed. He has never been strung out on drugs and denied the use of Heroin or Cocaine.

9. Factors such as Mr. Hall's history of alcohol and substance abuse, and his excessive use of alcohol and use of pills at the time of the crimes would also have been relevant with regard to nonstatutory mitigation. Such substances impair judgment and control, affect one's emotions and thought processes, and affect one's behavior. Such substance abuse was noted in my original report as is quote above.

10. Based upon the information which was known to me at the time, I could have testified to nonstatutory mitigating factors. Even my report, which was not prepared to answer questions regarding mitigation, stated that Mr. Hall suffered from deficits in memory, was partially oriented for time, had poor judgment, could only abstract two out of five proverbs, had been unconscious several times, has had suicidal thoughts, saw a psychiatrist in prison, and had a history of hallucinating, in addition to the matters discussed above.

11. At the time of the original trial, I would have been willing to discuss such nonstatutory mitigating circumstances had I been asked to do so. Had I been asked questions in that regard, psychological and neuropsychological testing would have been appropriate.

12. Since the time of my initial evaluation, I have reviewed additional materials regarding Mr. Hall which have been recently provided to me. These materials include statement from Mr. Hall's attorney in his 1968 tri-

al, records from the Department of Corrections, school records, mental health reports, information regarding a history of hallucinations, and bizarre behavior resulting from the abuse of alcohol, testing results, statements by Mr. Hall, official court transcripts, presentence reports, and other information. Had I been provided with such information at the time of my original evaluation of Mr. Hall, my opinions and ultimate conclusions with regard to evidence of a nonstatutory mitigating nature (discussed above) would have been further bolstered. In addition the materials I have reviewed reflect a childhood of material impoverishment and physical abuse. These materials also reflect that Mr. Hall's level of intellectual functioning is lower thatn the clinical assessment noted in my original report.

13. In summary, the matters discussed above and referred to in my original report would have been relevant to non-statutory mitigation relating to the defendant's mental health. I would have been willing to provide my views and expert testimoy in this regard had I been asked to do so at the time of my original evaluation.

Further affiant sayeth naught.

/s/ George W. Barnard
DR. GEORGE W. BARNARD

Sworn or affirmed before me this 21st day of August, 1988.

/s/ [illegible]
Notary Public, State of Florida

My Commission Expires:
[stamp illegible]

STATE OF FLORIDA)
) ss.
COUNTY OF SUMTER)

I, KATIE MAE GLENN, being duly sworn or affirmed, do hereby depose and say:

1. I am Katie Mae Glenn, the sister of Freddie Lee Hall. I live in Webster, Florida, my home for most of my life.

2. Freddie Lee is my baby brother and I love him very much. It is hard for me to believe that Freddie Lee did the violent acts that he is accused of. He has always been a good person and I have never known him to hurt anybody. But Freddie Lee has been hurt too much and by too many people.

3. Freddie Lee has experienced problems throughout his life, mostly because he is a slow learner. He walked and talked long after his other brothers and sisters. When he did talk, he stuttered so bad, we had a problem understanding him. The stuttering frustrated Freddie Lee and he would often stomp his foot when when the words would not come out.

4. Freddie Lee always seemed to be in his own little world and people said he was crazy. One of our neighbors told mama to take Freddie Lee to a psychologist. Mama would listen, but she never tried to do anything to help Freddie Lee. Mama did not believe in spending money on a doctor for anybody, including herself.

5. If mama had taken Freddie Lee to a doctor, I know that his life would have been different. He was in his own world because he could not read or write so that somebody could understand him. For a long time, he had to keep himself company. That is why Freddie

Lee talked to himself when other people were in the room or babbled or mumbled. It took Freddie Lee many years to learn how to communicate with other people. To know the way his sisters and brothers did was fun because he could have a sense of humor and make you laugh.

6. I will never forget when Freddie Lee filled his bucket with sand and leaves and put strawberries on top. We all thought it was money, but mama was furious. That day she beat Freddie Lee really bad and left him bruised. Mama beat Freddie Lee too much all of the time.

7. Mama said she would rather beat us than have the white folks kill us. She said that is why she was raising us the hard way. What mama did to us then would be child abuse now. She made us strip, beating us until we bled. Mama had no sympathy for anybody and believed any adult who said that we did wrong. We got many whippings for things we did not do, especially Freddie Lee. She beat him more than anyone because people told on him all of the time. But no one was spared her violence. Mama tied us to the bedposts by our hand and feet. My mama tied my brother, Henry, to a tree and set a fire under him. One day after she made me strip, she beat me in front of her boyfriend, who could see that I was menstruating. I was so embarrased and ashamed. Her boyfriend told me if I ever wanted to run away he would give me the money. That is why we were so nervous. We were scared to death of what she might do to us and what she and daddy might do to each other.

8. Mama and daddy fought with everything they could get—knives, guns, belts and their fists. I would be in a corner during their fights, which lasted all day

and night and sometimes throughout the weekend. I never had fingernails when I was growing up, because I would chew them down to the quick when my folks were fighting. Freddie Lee would just sit and stare or run out the door. The only reason they did not kill themselves is because my older brothers and sisters would get between them and keep them apart. My daddy got sick and went to live with his mother. While the fights stopped, my mama continued to beat us and make us work in the fields.

9. We would leave in the dark and come home in the dark when we worked in the fields. Everybody went to the fields, including the babies, who were placed under a tree. Mama gave the little children a syrup bucket and as they got older a water bucket and then a a foot tub. I wanted to go to school, but mama kept us out and told us to run from the truant officer if she came looking for us.

10. We all needed to be in school, but Freddie Lee needed it the most. It was impossible for him to catch up, but mama did not understand that. When we brought home bad grades, she beat us because she said we could do just as good as the other children could. But that was not true since no other children lived the way we did.

11. Mama believed that a famine was coming and she stored food away for when it happened. We had so little food and sometimes no food in our house except the food for mama was saving. Mama sent us to the fields all day to work without food and no matter how hungry we were we could not spend any of the money we earned. Sometimes I would be so hungry my lips turned white and my stomach cramped. But rather than spend the money and take a beating, I suffered in

silence until I got home. After all of mama's children were grown, we found out that she saved a lot of the money that we made.

12. Mama also spent our earnings on liquor. She was a heavy drinker, who made her own brew if she could not afford to buy it. Mama liked to socialize and she left us at home under Diana's supervision when she went to town with her friends. Sometimes, we barely had enough to eat and Diana would go to the neighbors and beg them for food. I think we would have starved if it had not been for some of our neighbors.

13. While some of the neighbors gave us food, others with mama's permission beat us almost as bad as mama. One lady beat Freddie Lee all the time and after she finished made him get under a bed in the dark. I felt so sorry for Freddie Lee because he was scary and really afraid of the dark.

14. Ever since Freddie Lee was a little boy, he told us he saw ghosts. He would bolt out the door when he did, scared out of his wits. He was superstitious just like mama who put things around the house to keep people from bothering her. Freddie Lee continued to have visions long after he became an adult.

15. Freddie Lee left school after being promoted to high school. He decided to get a job working in the fields. He was a good worker, but he was so easy that he either lost his money at gambling or gave it all away. Anybody could talk Freddie Lee out of his money because he was so nice.

16. Freddie Lee's hard life did not make him a criminal. I do not believe that he is the type of person who could hurt anyone and I know him as well as anybody.

17. I hope the court will consider the information contained in this affidavit. I would gladly have told it to Freddie Lee's lawyers, if they had asked.

Further affiant sayeth naught.

/s/ Katie Mae Glenn
Katie Mae Glenn

Sworn and affirmed before me this 23rd day of August, 1988.

/s/ [illegible]
Notary Public, State of Florida

My Commission Expires:
August 12, 1991

STATE OF FLORIDA)
) ss.
COUNTY OF SUMTER)

I, DIANA MITCHELL-RIGSBY, being duly sworn or affirmed, do hereby depose and say:

1. I am Diana Mitchell-Rigsby, the sister of Freddie Lee Hall. I live in Webster, Florida, my home for most of my life.

2. Freddie Lee is one of 17 children born to our mother, Delia Ellis Hall. I am eight years older than Freddie and I remember his birth so well, because my mama almost died a few weeks before he was born. She had a severe case of what she thought was indigestion, but nothing made it better. By that evening, my mama was almost unconscious. My brothers wrapped her in a blanket and carried her in their arms five miles to the home of her employer. Mr. Booker took her to a doctor in Wildwood who said if my mama had not gotten there when she did, she would have died. She returned home and continued to work in the fields as she had done throughout her pregnancy. It was nothing for my mother to work all day and have a baby that night. Several weeks later, Freddie Lee was born. Freddie Lee was the first and only one of my mama's children born in a hospital. My mama always used a midwife and I assumed she went to the hospital because of the complications with her pregnancy.

3. My infant brother cried uncontrollably, probably hungry for more milk. Freddie Lee was mama's sixteenth child and she had too little milk by the time he came along. I tried to comfort him, without success. As if that was not enough, we soon realized something was very wrong with Freddie Lee. It took him longer

to learn to walk and he had great difficulty forming his words. When he did learn to talk, he stuttered so bad that it was difficult to understand him.

4. Freddie Lee's school performance confirmed our suspicions that he was mentally retarded. He was never able to learn to read or write and eventually the teachers gave up on him and passed him from one grade to another. School was so frustrating for him that he frequently ran away when his teachers chastised him or when kids teased him. He ran away rather than sass his teachers.

5. Freddie Lee needed help and everybody in town knew it by the time he was school age. A minister came to see my mama and told her that Freddie Lee would run into some problems when he got older if he did not get some help. But my mother ignored the minister's warnings as well as the warnings of other people. She never acknowledged that Freddie Lee was not normal and never admitted that she and our daddy were part of the problem.

6. Our family had a terrible homelife and while I know that Freddie Lee was born with a mental problem, living in our house made it worse. My parents physically fought almost daily, using guns, knives or whatever was handy. The fights would sometimes go on all night, especially if they had been drinking. Some of the children would cry, so afraid that my parents might kill each other. I often saw Freddie Lee sitting in a corner staring off into space as if he was in a trance.

7. The fighting stopped after my daddy, paralyzed by a stroke, went to live with his mother so that she could take care of him. But our troubled lives continued because of mama.

8. Mama beat us unmercifully when we misbehaved. I am sure that my sisters and brothers bear scars or other marks from our mama's whippings. Mama made us take our clothes off when she beat us, inflicting blows that made us bleed. She used plaited tree branches, a rope, which she tied in knots and soaked in water to make it stiff, an ironing cord and anything else that she could get her hands on. During the night, Mama often tied our hands or legs to the bed posts with rope that she put through the rafters in the ceiling. The following morning we would be awakened when she hoisted us up in the air to beat us.

9. Mama frequently beat us before she went to work even though we had done nothing wrong. She said we would get it again even worse if we misbehaved. Mama gave the neighbors permission to punish us whenever she was away from home. One neighbor beat us when she did not beat her own children for misbehaving, but Freddie Lee got the worst of it. Freddie Lee was very sensitive and was teased a great deal by other children when he stuttered or got confused. When he and the other kids would fuss and fight, this lady would punish him. She said that she beat him a lot, because she was trying to break him or change his bad behaviors. After she beat Freddie Lee, she would put him under a bed all day until my mother came home, a practice that went on for several years. Freddie Lee was terrified of the dark and being under that bed with the door closed really affected him. I can hear him now whimpering and pleading to get out. Freddie Lee remained afraid of the dark long after he became an adult.

10. When my mama wasn't beating us she was working us to death. Everyone in our house who could walk had to work in the fields. Mama made $5 some-

time $10 a week doing farmwork and ironing sheets. It was never enough. So, she kept us out of school during the seasons, when we picked peas, peppers, cotton and other crops. My mama was as stern about teaching us to work as she was about our behavior. If we failed to complete a row, she beat us right in the field.

11. Our wages helped mama to keep a roof over our heads, but we still never had enough to eat. Many days and nights, we were hungry. We had food some of the time, but mama stored the food away for the famine. She was a superstitious woman, who believed that a famine would occur and food in short supply similar to the depression. She denied us access to food when we were desparately hungry. It was hard on Freddie Lee and the younger children whose mouths would have white rings around them caused by hunger. To see food and not be able to eat was so confusing to the little ones. I begged for food in order to feed them. It if had not been for the generosity of some of our neighborhs, we would have starved.

12. We always had compassion for Freddie Lee's problems and accepted his wierd behavior. Freddie Lee could be sitting in a room full of people taking and carry on a conversation with himself. Even when he talked to somebody, he moved from one subject to the other, he never could keep his mind on one thing. I think that's why he preferred the company of children to adults. I had hoped to protect Freddie lee from the outside world. Even though he was full grown, mentally he was a child.

13. When Freddie lee was around 16, he quit school to work. He was a hard worker who earned a good paycheck, but he gave all of his money away. My mama never said she loved us or showed us any affection. We

were all starved for affection by the time we reached adulthood. Freddie Lee accomplished this by giving his money to anyone who paid attention to him. He was gullible and easily influenced, a problem we warned him about. But it was useless. Freddie Lee had friends for the first time in his life, even though he had to buy them.

14. Freddie Lee has never been the type of person to start a fight and I will never believe that he is guilty of the crimes for which he was convicted in 1967 or 1978. I do not believe that Freddie Lee could ever hurt anyone.

15. Freddie Lee needed education and someone to help him to learn how to face life's problems and pressures. In his environment, Freddie Lee never had a chance.

16. If Freddie Lee's attorneys had asked I would have been happy to tell all that I knew about how Freddie Lee grew up.

Further affiant sayeth naught.

/s/ Diana Rigsby
Diana Mitchell-Rigsby

Sworn and affirmed before me this 23rd day of August, 1988.

/s/ [illegible]
Notary Public, State of Florida

My Commission Expires:
August 12, 1991

DEPOSITION OF HENRY ELLIS
(NOV. 21, 1990)

Q. Could you state your name, please, Mr. Ellis.

A. It's Henry Ellis.

* * *

Q. Okay. All right. Are you one of Freddie Lee's brothers?

A. I'm the oldest one.

* * *

Q. Okay. What can you tell me about Freddie Lee, about what kind of a child he was, whether he was slow or smart or anything about him?

A. Well, he was a good worker. And his mind wasn't right, not to me.

Q. How do you mean? Give me an example.

A. Well, when I got back, I moved back when he was seven years old, he never did act right. Mama whip him like she used to do to me.

Q. Did she whip him the same way she whipped you?

A. Yes, sir. One time she whipped him in a sack.

Q. Describe that for me.

A. Well, she hang him up with a rope and put him inside the sack buck naked.

* * *

Q. Do you think now looking back that there was something wrong with your mother mentally?

A. I tell you the truth, something was wrong with her but what it was, I don't know. I say she was mean. See, that old lady mean as a rattlesnake. She was meaner than any rattlesnake you ever seen.

* * *

DEPOSITION OF ROBERT ELLIS
(NOV. 21, 1990)

Q. Would you please state your name, please.

A. Robert Ellis.

* * *

Q. Okay. Are you kin?

A. That's my brother.

* * *

Q. How would you describe your brother as a child, mentally?

A. He—he just was, you know, like off, you know.

* * *

Q. Okay. Do you remember when the last time was that you had seen Freddie before he was arrested, whether it was that day or the day before?

A. Let's see. I want to be sure now.

Q. I understand.

A. Want to take my time and think. That was in '78. Yes, sir. I know now where I was.

Q. Okay.

A. I was living in a place called Frog Alley at the time. My mother lived across town.

Q. Um-hmm.

A. I hadn't seen him about two or three days. About two or three days.

Q. When you had seen him, was there anything different about him? Was he upset or anything strange about him at all?

A. No, he almost act like a child, you know, have a child mind.

* * *

Q. Okay. Is there anything that you feel would be important that you could tell this jury to help them decide what the right thing to do with Freddie Lee Hall is? What would you want to tell them?

A. Well, I could tell them—you know, I'd like to tell them what I know, you know—he's my brother, you know, I've known him all my life—what kind of mind, how his mind and everything was.

Q. Okay.

A. He just wasn't ordinary like me or you, you know.

* * *

DEPOSITION OF WILLIE C. HALL
(NOV. 29, 1990)

WILLIE C. HALL

was called as a witness, having been first duly sworn, examined and testified as follows:

* * *

Q You're Freddie Lee Hall's brother?

A Yes, I am.

Q Are you older or younger?

A Older.

Q How much older?

A I guess about two years.

Q Can you tell me about Freddie, what kind of person Freddie is?

A Well, Freddie, he's a person that I guess he don't understand himself in some ways.

Q How do you mean?

A Well, coming up during his years, seem like everything he do he don't understand it.

Q Give me an example.

A Well, just way of living. You can tell him to do one thing and the way he do anything, he doing it right, and he don't. And it's been his problem all of his life. And when you try to show him different, he can't see that way.

Q What is his reaction?

A Beg your pardon?

Q What is his usual reaction when you confront him, the fact that he is doing something wrong? Does he get upset about it?

A Well, mostly he never have been in the stage where he would be doing something wrong. It's just the way how he come up from the childhood. Nobody never gave him a chance to participate in anything. And he always been—like with brothers, sisters, even myself and mother, which she brought us up by herself—he mostly been an abused kid all his life.

Q Describe that. How was he abused?

A Beaten, many times that we have been on him, you know, entire family trying to get him to proceed in a normal way, you know, of living.

Q Who?

A My mother used to whip him a lots and many times she hung him up on a tree limb which hung down low around the house, oak tree around the house, and bags and put smokes on him.

Q Put what on him?

A Like smokes.

Q Cigarettes?

A No, like an Indian do. Bag about that high, you know, rope like that, have it tied like a possum in it like that, and from that used to whoop him, tie him to the bed with ropes, used to have switches that you plait together.

Q Did she do that to you?

A I have got them, but was worser.

Q Do you know why?

A Well, he just different from the rest. He always got most. I would say around ten or fifteen times a week sometimes.

Q Do you have any idea why he got more than the other children in the family?

A Well, he just would never be a normal kid.

Q How was he other than normal?

A He just couldn't seem to have any kind of understanding, education-wise, even going to school. He just never had—he probably had first grade level.

Q Well, did you mother beat him because he wasn't as smart as his brothers and sisters?

A No, she didn't beat him because he wasn't that smart. He just wasn't relating to the family like the rest.

Q She would beat him for that?

A And eating a lot of times, he didn't get enough food and he be hollering that he want more. I remember when he used to be six, he be saying, "I'm hungry." I want some biscuits." Mostly she cooked cornbread and stuff. He couldn't just sit and eat to the table like we do and get enough, you know, like that. So, it's a big family, so I guess lines to go through. And he would get a whooping and cry at night. If he cry at night, he get a whooping. Sometime he be tied to the bed all night. And many time some of my other sisters and brothers be pinching him like that and stuff, you know.

Q Did you do that to him?

A Well, once I gave a gun to him, to preacher, to shoot him in the leg. I was about 16. And we had

found—I had found a .22 pistol. And I remember I give it to him and he tried to shoot him one time in the leg.

Q Who tried to shoot him?

A The preacher. I gave him the gun to try to shoot him in the leg.

Q Let's stop. Who tried to shoot who?

A Elder Hall.

Q Tied to shoot Freddie?

A In the leg, yes.

Q How did the preacher—your brother James is the preacher? Is that what you are saying?

A I think what happened, we had the car shed in a smoke house there. And during the back of—we had—my brother had his car, Elder Hall, he wasn't a preacher at that time. And he didn't like for nobody to touch his car. Always kept it clean. And Fred, he only had something kid mind, was all up on the top of it, some kind of way, you know, like that and took the door, the garage, and slammed it into the car.

So, with that—with my brother, you know, that was his pride and joy. He worked hard like that. So, he got everybody, went to arguing, words like that. And I think he run to catch him and he couldn't catch him. So, at that time I had the .22. I said, "Here, just shoot him in the leg," you know, like that. He missed him and I'm glad he did miss him. We were much younger at the time.

* * *

EXCERPTS OF 1990 SENTENCING HEARING

T. RICHARD HAGIN

* * *

Q Would you please state your name for the ladies and gentlemen of the jury?

A My name is T. Richard Hagin. I live in Bushnell, Florida.

* * *

Q Back during that time, Mr. Hagin, did you have occasion to meet Mr. Hall, Freddie Hall?

A Yes.

Q Can you tell the ladies and gentleman of the jury what your introduction to Mr. Hall involved?

A I was appointed by the circuit court to represent Mr. Hall in a case that was brought against him.

Q What kind of case was that, sir?

A He was charged with rape, which was a capital offense.

* * *

Q Mr. Hagin, do you have an opinion about whether or not Freddie was guilty of that charge in 1968?

A Of all the people I've ever represented on a criminal case, Freddie Lee is the only one I ever felt was not guilty.

Q And you've had that opinion since that day?

A Since that day, yes.

* * *

Q Did Freddie Lee help you in his trial?

A No, he did not.

Q Why?

A I don't think he was able to.

Q Why?

A I think he was scared.

Q Did you have trouble during the course of the trial understanding him?

A Couldn't really understand anything he said because when he first started the trial I explained to him outside, you know: "Freddie, I'm going to have to concentrate my attention on what the witnesses are saying and what the Judge is saying so I want to give you a piece of paper and a pencil and I want you to write down anything you want me to ask when we're qualifying the jury or any of the witnesses."

I gave him a pencil or a pen and a sheet of yellow paper at the beginning of the trial. When the trial was over all that was on that yellow pad was some numbers, I think one through 12 or one through 13 or something. And that was all he ever wrote down the whole week or however long the trial lasted.

Q Did you later learn that Freddie couldn't write very well?

A Yes.

Q In terms of your interaction with Freddie, how would you describe his intelligence?

A Freddie's not an intelligent individual.

Q Did you find out at some point during the course of representing Freddie about a test that he had taken?

A Are you talking about to get into the armed services?

Q Yes.

A Yes.

Q Tell the jury about that sir.

A When I first interviewed Freddie I tried to get a little bit of his background and so forth. I asked him if he had ever been in the military service and he told me, no, he had been drafted I believe in September of 1965 and he went to Jacksonville to the Naval Air Station to take his physical.

And he said he didn't want to go into the service so he faked the doctors out and after that they made him talk to two or three psychiatrists and then they sent him home.

Q Did you find out what his score was on the Selective Service Test?

A I later found out that he had made a score of one out of a possible 100.

Q Did you find it questionable that Freddie Hall could fake out the Selective Service Board?

A Yeah.

Q Tell me why.

A Well, he just really doesn't have the mental capacity to fake out anybody I don't think, particularly a couple of psychiatrists.

* * *

HANNA FOSTER

* * *

Q Mrs. Foster, would you state your name, please for the ladies and gentlemen of the jury?

A Hanna M. Foster.

* * *

Q And what is your profession, ma'am, or your occupation?

A I am assistant superintendent of schools, Sumter County, Florida.

* * *

Q How far do the records reflect that Freddie went to school?

A His last listing for attendance is in the 11th grade, year 1962-63.

Q Do you, likewise, on your records have some comments of some of Freddie's teachers that were written on those records?

A Yes, sir. From time to time teachers would make comments in a section provided under "guidance and counseling."

Q Would you please for the jury read what those comments are, starting with the first comment dated May 30th, 1952.

A Yes. That particular reference, May 30th, 1952, the teacher wrote: "His mental maturity is far below his chronological age." And the follow-up, "providing experiences that will increase his mental achievements."

On 6/2/53: "I have found Freddie to be very inattentive and extra slow in comprehension." Follow-up: "Special teacher."

Third grade, 6/2/54: "He is slow in all of his work."

Four, grade four, 6/5/55: "Mentally retarded."

Fifth grade, 6/5/56: "Freddie is slow in all phases of work, mentally unadjusted."

Sixth grade: "Mentally retarded," and follow-up: "Special teacher."

The same comment is made for the 7th grade, 5/3/58, and eighth grade.

Q The same—

A Mentally retarded, special teacher as a follow-up.

Q Are there any indications on the record that at any time Freddie had a special teacher as was recommended?

A This is an exceptionally old record and there is, to my knowledge, no indicator that he was ever placed in a special class although he might have received special services through the regular classroom teacher.

MR. JOHNSON: Your honor, at this time I would move into the evidence what's been marked for identification as Defendant's Exhibit Number One.

MR. TATTI: I would like to look at it. I don't believe I have an objection.

No objection, Your Honor.

THE COURT: So admitted into evidence as Defendant's exhibit.

(The last-above-reference-to item was received and filed in evidence as Defendant's Exhibit One.)

* * *

ROOSEVELT JOHNSON

* * *

Q Would you please state your name for the ladies and gentlemen of the jury?

A My name is Roosevelt Johnson.

Q Mr. Johnson, what is your profession or occupation?

A I'm principal of Memorial Elementary School in Arcadia, Florida.

* * *

Q And tell the jury your relationship with the Hall family.

A Well, we lived—it was two houses between us and we were playmates, we grew up together and spent a great deal of time together.

* * *

Q Was Freddie an intelligent person growing up?

A I would say no. And I guess I should explain way. Growing up together, at that particular time I did not know anything or classifications as far as mental retardation, for example, or learning disabled or dyslexia. I did not realize that there was such a term. I became more acquainted with it after becoming an educator.

However, during that particular time I realized that there was something different about him. He did not learn as others learned as far as the academic abil-

ity was concerned. I felt that his cognitive skills were very lacking.

But I thought that his gross motor skills as far as being able to run and play were fine. He had fine skills there, but not able to retain what was taught to him.

If he reads and writes well now, he probably did at a later date. I can—when I left the area he was not doing well at that time. I don't know whether he has learned at this point or not.

Q Did he have trouble communicating?

A Yes, he did, because he had a very bad speech impediment and many times people would not understand him. But being close to him, because we are close in age, I understood most of the things.

* * *

Q What are your recollections of Freddie's maturity level?

A When I left, even though physically, the physical structure was matured, but mentally I felt that he had child-like simplicity or behavior.

Q Emotional as well as mental?

A I would say. I would say so. I'm not, you know, I'm not a psychologist—

Q Yes, sir.

A —but I'm an educator at this particular point. And when I look back over it, that's the way that I look at it now. But at that particular time I would not have been able to say specifically that this is what was the case.

But as an educator now, if I would have had him in my class I would have definitely recommended him for the E.S.E. programs, which is exceptional student education program.

Q For?

A I probably would have thought in terms of—if I had to make a choice, I probably would have said E.M.E. due to the fact that—

Q What's that?

A It's educo-mentally handicapped.

Q Calling on you again to reflect back to your early years, did Freddie's mother have some peculiar habits about food?

A Yes, she did.

Q Tell the jury about hose.

A As a matter of a fact, she built pantries—and I can recall to this day—and painted them which was I now was an army gray. And they were in the kitchen. But she put the food in those cabinets and put a padlock on them that they were not allowed to get into them.

Q And did she preclude or stop people from getting into the cabinets even though those people might be hungry?

A They were not allowed. They were not given the key, I know that, to go into them.

Q Were there times when there was not food in the Hall household?

A Yes. The reason I know that is because normally when there was nothing to eat they would to

come my home and ask my mother for a piece of brief many times or they would ask for syrup.

Here again, we also made syrup, raised sugar cane and made syrup so we had a lot of homemade syrup, gallons in the storehouse, and we would share that if they said that they needed it.

Q Now, did you have occasion ever, Mr. Johnson, to see Freddie's mother punish Freddie?

A Yes.

Q Tell the jury about those occasions.

A Well, I saw her beat him many times.

Q Describe the beatings.

A Well, I would think in terms of brutality. You would find a lot of whelps, even to the point of drawing blood sometimes. It's probably—if you looked at his body, I imagine you might find some scars there that were, you know, left from those.

Q Did you have occasion on a Sunday to see her beating Freddie?

A Yes. And when I say—you back up and talk about a Sunday afternoon. We had been to church that Sunday. Of course, all of us in the community went to church. It was a small church and the Methodists were held first and third and the Baptists second and fourth. But we would go basically every Sunday.

And after service—and I don't recall exactly why she called him in to beat him at that time, but I do know that she was very loud with it. Of course, when she punished him, she would be loud. And living only three doors from them and houses were very fairly

close, you could always hear or possibly see what was going on.

And at this particular time she said to him she wanted him to strip and she used the term, you know, "take off all of your clothing."

Q How old was Freddie then, if you can remember?

A He was in his teens because he was a large sized individual. We all were large at that point. And at the point she was beating him, I guess you would say probably unmerciful, at that point he asked her: "Well, why don't you just go ahead on and kill me?"

Q What did she go?

A Well, she used the term: "God-dern you nigger, I will kill you."

Q Is that exactly what she said, Mr. Johnson?

A Those were her words. And she got a gun, of course, and he jumped up and ran.

Q Why do you say "of course" she got a gun?

A I use the term "of course" because she would say that she would get her gun. She would use that quite frequently.

* * *

JAMES HALL

* * *

Q Would you state your name, please?

A James Hall.

Q Could you state what your occupation is?

A Pastor, Church of Our Lord Jesus Christ, Plant City.

Q Okay. I'm going to ask you to speak up just a little bit. Okay?

A Yes.

Q How old are you, Mr. Hall?

A Fifty-one.

Q And who was your father?

A James Hall, Senior.

Q Senior?

A Yes.

Q Same father as Freddie Lee Hall?

A Yes.

Q Could you please for the jury describe what your early years were like at home?

A My early years life at home, coming up from a child, we had most—like we had to work from a child, you know, up. Had to work and we didn't have the pleasures that other kids had.

Q Would you call it a pleasant childhood?

A No, we didn't have a pleasant childhood.

Q Now, we're heard—the jury has heard that you had a number or have a number of brothers and sisters; correct?

A Right.

Q Did your brother Freddie Lee seem to develop and grow mentally like your other brothers and sisters?

A No, he did not.

Q Can you describe that for the jury a little bit? How do you mean that?

A Well, from a child he was—as I said, he was slow with speech and he was mostly was slow to learn. He didn't understand as we did, what have you. He was most likely a child all the way up from child up to his manhood, as of now.

And he just didn't have the knowledge to write or he couldn't defend himself in words and what have you. He was just slow.

Q Talking about words, did Freddie learn to talk like other kids?

A No. He couldn't talk as the others could.

Q Could you explain that, please?

A There was times when looked like he tried to bring out his words and he couldn't he would beat, just pound on something, trying to get his words out.

Q Because he couldn't say the words?

A Right, he couldn't say the words?

Q When you say he used to beat on the table, what do you mean? What do you think he was feeling?

A He would just be pounding, just pounding trying to get words out but he—

Q Did he seem frustrated at not being able to talk?

A Yes. Right.

* * *

Q I want you to remember back, Mr. Hall. Did Freddie seem to get punished worse than the other children?

A I would say he did.

Q Do you know why?

A Well, I feel that he couldn't defend himself in words and what-have-you. He would—that's why he mostly got punished I feel to the things, a lot of things that he didn't—was accused of, he didn't do it, and he couldn't defend himself and he got more whippings than the others did.

Q Were they severe or bad whippings?

A Oh, yes, they was. They were severe.

Q Do you remember Freddie ever being tied up by your mother?

A Yes.

Q What would happen after he was tied up?

A She would whip him naked, with no clothes. She would whip him.

Q Do you remember Freddie ever being tied up and kind of like hung and hoisted up from the ceiling?

A Yes; not only him but the others, too.

Q The others, too?

A Right.

Q What would happen when you were or the kids were tied up and hoisted and hung from the ceiling?

A Well, what she would do, she would tie their hands and tie them to the ceiling of the house because we didn't—

At that time the house didn't have what you would call a ceiling. It had just the joists crossways.

And she would throw a rope across and she would tie their hands and beat them, you know, naked.

Q Naked?

A Right.

Q Freddie?

A Yes.

Q And like you said, Freddie seemed to get it worse than the other kids?

A Oh, yes, he did.

* * *

Q Did Freddie act like the other kids?

A No, he did not.

Q Explain that, please.

A It was different with him than the rest. He was a person who couldn't think. He couldn't understand, didn't have knowledge, you know, look like, wisdom as the others. He just was a person in his own world and he didn't understand as other kids did.

Q That didn't mean he didn't try.

A He tried but he didn't—he couldn't get it. It just wasn't there.

* * *

Q Were there any times when your mother gave permission for other people in the neighborhood to punish him?

A Oh, yes, she did.

Q Explain that, please.

A Well, anyone in the neighborhood there had the permission from her to chastise in their own way. And they did to the extent where with Freddie, they had something—like it was two people there in the neighborhood who had something like they would punish him, they would put him under the bed.

Q How long would he have to stay under the bed?

A Well, I would say if they put him under the bed somewhere around 10:00, they would keep him under there all day long.

Q All day long?

A All day long.

Q What would happen if he got out from under the bed?

A He wasn't going to get out. They made sure he stayed under there. That's what they called putting him in jail.

* * *

FAYE PAIGE

Q Good afternoon. Would you please state your name for the record?

A Faye Paige.

* * *

Q And what is your relationship to Freddie Lee Hall?

A I'm his niece.

* * *

Q What did the people in the community think of Freddie? What was his reputation?

A Well, they said that he was crazy.

Q And how did Freddie that that?

A He didn't know how to respond. And by me being a child, I couldn't—I didn't know, you know, I didn't know how to help him. And everyone laughed at Freddie. They laughed at him. And so he related more to me and my brothers, you know.

Q How much older is Freddie than you are?

A Well, during—he's about 13 years older than I was. But at the time I was, you know, more—I thought that we was—I didn't know it was a difference in the age at the time.

* * *

LUGENE ELLIS

* * *

Q State your name, please, for the jury.

A My name is Eugene Elliott.*

Q Mr. Elliott, are you related to Freddie Hall?

A Yes.

Q How?

A He's my brother.

* * *

Q Okay. Describe Freddie when he was born and what you recollect about those years.

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* This and other references to "Eugene Elliot" are apparently typos that appeared in the original 1990 transcript—the person who testified during this hearing and in 2009 is named Lugene Ellis.

A Freddie, when he was born, there was a lot of us in the family but Freddie, he was a little kind of different from the rest of us, rest of us boys.

Q What do you mean when you say "different?"

A He didn't understand like the rest of us. It was just like his mind didn't function like the rest of us, like the rest of us boys did.

* * *

Q Now, what about nighttime? Did he—was he afraid of the dark?

A He was afraid of the dark.

Q Tell us about that.

A He was afraid of the dark. If he's in his room, you've got to keep the lights on all night long. He ain't going to sleep with no lights on.

Q How was he—even as a grown person?

A As a grown person.

* * *

STIPULATION RE WITNESSES ROBERT ELLIS, HENRY ELLIS, ETHEL MAE MILLER, AND WILLIE C. HALL

And this is the stipulation. I'm reading it to you. You are to consider this as evidence in the case. Weigh it and evaluate it the same as you would any other evidence in the case.

Ladies and gentlemen, you are advised that Robert Ellis, Henry Ellis, Ethel Mae Miller and Willie C. Hall would have testified to the same factual circumstances that other family witnesses have testified to.

DR. BARBARA BARD

Q Doctor, would you state your name please for the ladies and gentlemen of the jury.

A My name is Barbara Bard.

Q And what is your occupation or profession?

A I'm a professor at Central Connecticut State University in New Britain, Connecticut in the department of special education.

* * *

Q Dr. Bard, did you have occasion to evaluate Freddie Hall back in September of 1986?

A Yes, I did.

Q Would you describe for us please generally the techniques that you used in evaluating Mr. Hall.

A I—I did a—an educational evaluation and a speech and language evaluation on Mr. Hall and I've used the—essentially the Woodcock-Johnson Psycho-Educational Battery. I used a sub-test of the Test of Written Language. I used a language screening. I did a speech test. And I did some probing into a particular area of learning disabilities.

* * *

Q Doctor, I won't take you through all sixteen of your sub-tests. Let me ask you this, ma'am, how did he score overall?

A Overall his mean score, that's all the scores together and this is what you get, would be one point eight, which would be roughly the end of first grade.

Q Did his scores on this particular test, in terms of range of intellectual ability, what—how did he score?

A Well, there isn't—there isn't really much of a range. There's the one score in the sixth grade range and everything else is around first and second grade.

Q Does that put him in the range of retarded with respect to—

A It certain—it's a profile and it's consistent with the profile of a mentally retarded adult, yes.

Q Now, going back to the other tests that you gave, what were your conclusions with respect to those tests? And we'll just take them one at a time, it's your choice.

A The story test again was virtually unscorable. He didn't get the point that these pictures told a story and—remember I told you it's a story of a planet breaking up, space ships leaving the planet, and then the people resettling on a planet. I give this to many, many children. My students have given it to many, many children and children get it. I mean, they get the story.

And this was Mr. Hall's story, five people is standing outdoor and the sun is out. Eight people is just outdoor. That it.

So—in order to score this you would—usually you'd count the number of sentences, you'd count the number of words, you look for vocabulary use and you're very interested in what else they might read into this. Some children tell very imaginative tales about this. They write on both sides. They're given—they're given this much (indicating) paper to write on and you can see that he just wrote two or three lines, so—I mean, I really—I didn't even begin—go into great detail in scoring this. It's just—it's a—it's a result that you would not expect from a second grader.

* * *

Q The speech screening Goldman-Fristos Test of Articulation.

A Okay. Mr. Hall's speech is difficult to understand and I asked him about that and I gave him a screening test and the results were kind of interesting in that there are sounds which he has difficulty making, but not as many as you would think from the difficulty that you have understanding him when he talks, so that his—his sound production areas are far worse when he speaks in connected speech than when you isolate them and just say, say this word.

He can make the sound in isolation, but when he speaks he leaves off—he doesn't say a lot of the consonant sounds very clearly and it's difficult to understand him and I think people do have difficulty in understanding him and I think that the kind of speech disorder that he has is neurologically based.

* * *

DR. DOROTHY LEWIS (by videotaped Oct. 15, 1990 deposition)

Q Dr. Lewis, would you state your name.

A Dorothy Otnow Lewis, M.D.

Q What is your profession?

A Psychiatrist.

Q Can you please tell us a little bit about your educational background.

A I did my undergraduate work at Radcliffe College of Harvard University. I went to Medical School at Yale University School of Medicine. I did my internship at Yale and I then trained in adult—actually, no, I did a year of National Institute mental health research

fellowship for a year and I did a residency in adult psychiatry at Yale and then a fellowship of child psychiatry at Yale.

* * *

MR. JOHNSON: At this time, I would offer Dr. Lewis as an expert in the field of psychiatry.

MR. TATTI: Without objection.

Q Doctor, back in September of 1986, did you have occasion to get involved in the case of the State of Florida versus Freddie Hall?

A Yes.

Q Can you tell us how was it that you came about getting involved in the case?

A Well, we were doing a study of young people, of juveniles on Death Row in Florida and we were doing psychiatric, neurological, psychological, psychoeducational evaluation of every juvenile in several different states and, at the time, his attorney got in touch with me and asked that I try to include him in the evaluation because I believe it was because he had not had a thorough assessment before that.

* * *

Q When you say we, who are your referring to?

A Well, I did the psychiatric evaluation. Dr. Jonathan Pincus did the neurological evaluation. Dr. Ellis Richardson did the neuropsychological evaluation. A student named Marilyn Feldman did the ordinary psychological testing and also we had some technicians from Dr. Leslie Pritchard's laboratory here at N.Y.U. who did the electroencephalogram.

* * *

Q In comparison with the other persons you saw while you were in Florida, how did Mr. Hall rank in terms of impairments you found present in him?

MR. TATTI: I'm going to object to that.

MR. JOHNSON: Go ahead and answer the question.

A Well, Mr. Hall was extremely impaired psychiatrically, neurologically and intellectually. So he would have been one of the more impaired of the individuals who were evaluated.

* * *

[Q] Were you the supervisor of Ms. Feldman who did, I believe you described it as she did the psychological testing?

A I was the project director but her psychological testing was supervised by a faculty member at the school at which she was getting her doctorate because she was doing psychological testing and we felt that a professor of psychology would be more appropriate than a psychiatrist.

* * *

Q Would you tell me generally what Ms. Feldman's findings were?

A I'd have to look.

Q Sure. Go right ahead.

A (PERUSING) Her summary was that she found Mr. Hall was a man of limited intelligence. She suspected that he had some organic brain damage and what she termed extreme impairment in personality integration and, by this, she said that, based on her findings and the review by her supervisor, that he was

capable of psychotic disorganization and she said that there were gaps in reality testing, meaning in his contract with reality, meaning that were suggestive of a schizophrenic disorder.

She said that his perceptual boundaries were fluid and disorganized with [illegible] self-stability or sense of the world as a stable or nutrient place and that he felt helpless, dependent and had a very negative self image.

In summary, she found him to be intellectually limited, possibly schizophrenic and also there were signs of brain damage.

Q Was her evaluation at least confirmed by your evaluation and your conclusion?

A It was consistent, yes, with mine.

Q With respect to any intelligence testing that Ms. Feldman performed on Mr. Hall, what was his—what were her findings with respect to his intelligence level?

A She found that he had a verbal I.Q. of 77 and a performance of 85 and a full scale I.Q. of 80 and that put him on the borderline of retarded versus the low average range of intellectual functioning.

Q Was that likewise consistent with your findings?

A Yes. I had actually—actually, he had appeared possibly even more limited. But that may have been because he has a speech impairment, she that could have been it.

* * *

Q What exactly did Dr. Pritchard do?

A Well, Dr. Pritchard was not there. Dr. Pritchard read the results of a computerized electroencephalogram, which was done by her technicians.

* * *

Q Mr. Hall's evaluation, was it normal or abnormal?

A It was—her interpretation was that it was moderately abnormal and there was particular abnormalities on the right side, particularly in the right central and the right frontal temporal regions.

Q Does that imply at least some brain damage to the right side of his brain?

A It implies some dysfunction on the right side of his brain. Sometimes you can have abnormal activity and yet you may not see it on a CAT scan or you may not see it on an MRI. So that I think psychiatrists and neurologists tend to talk more in terms of brain dysfunction in a particular area unless you can actually see it.

* * *

Q Let's talk a little bit about Dr. Bard. What was her responsibility?

A Dr. Bard is a professor and she was head of the department, I guess, at Central Connecticut State University. She was head of the department that deals with learning disabilities and her function in the research team was to assess educational problems or achievements, or what have you, at educational levels.

Q In terms of her evaluation of Mr. Hall, what were her conclusions with respect to whether or not Mr. Hall was learning disabled or whether he was functioning normally for a person of his age?

A May I read to you what she says?

Q Sure.

A She says, "The only score that even—" this is on the Woodcock Johnson Psychoeducational Battery. "The only score that even approaches an adult level is one which has nothing to do with formal schooling, the special relations sub-test."

Q Are you familiar with that test?

A No.

Q Go ahead.

A "All other sub-tests ranged from a grade level score of zero to a grade level of 4.7" and she said, "Those which represent the ability to read and understand what was been read are representative of an almost—of almost total illiteracy. Though he knows the letters, he can neither read words nor can he interpret what the few words he reads mean. His math abilities are so low as to be below the first grade level. He did not get a single example correct on the test instrument which began with material on a pre-kindergarten level. So he was one of the most impaired individuals."

Q What were her summary and conclusions?

A She says that "Mr. Hall is an illiterate adult. His mathematical abilities are virtually nonexistent. He is probably incapable of even the most reason basic living skills, which incorporate math and reading, such as understanding and paying a bill, writing a check or keeping a checking account. Certainly, he would get very little from a daily newspaper. His speech is often incomprehensible and his use and understanding of language is no better than a nine-year-old's. His skills are so rudimentary that the assessment of whether or not

he has a specific learning disability is difficult to make. Certainly in the area of visual perception, there is reason to suspect a considerable deficit."

* * *

Q Who is Dr. Pincus?

A Dr. Pincus is currently professor and chairman of the department of neurology at Georgetown University. I believe, at the time—no. Maybe he was at that time too, when he did this. Though he was at Yale when we first started working together, I don't recall whether he was a professor of neurology at Yale at that time. He may have been already at Georgetown.

Q What were his conclusions with respect to his evaluation of Mr. Hall?

A He said, "This patient shows evidence of poor memory and probably retardation. He shows a significant discrepancy between the right and left performance of finger taps, which suggests a right hemisphere abnormality though both sides are slow."

* * *

Q Was there likewise a Dr. Ellis Richardson involved in this case?

A Yes.

Q What was Dr. Richardson's responsibility with respect to the team?

A His responsibility was to perform the Holstead, Raytan and Battery of neuropsychology tests.

Q Can you tell us what those are?

A They are a lengthy battery of different kinds of exercises that tap different functions of the brain and

I'm not sure what else to say. We have found, and many people I think, have found that in many instances they are more sensitive even than the ordinary neurological examination because they are extremely detailed.

Q Did his conclusions likewise appear to be consistent with everyone else's?

A Let me find it.

Q Okay.

A (WITNESS COMPLIES) Again, he noted that "Although Mr. Hall was cooperative during the session and he felt he was performing to the best of his ability," he said that "His speech was slurred and it was very difficult to understand" and he said that the intelligence test, which he also reviewed, indicated a borderline intellectual ability and then he went on to say that the scores on the Holstead Raytan were characteristic of patients with serious brain impairment.

* * *

Q Let's get back for a few minutes now to your personal one-on-one evaluation of Mr. Hall, which I believe you've testified took approximately two and-a-half hours; is that correct?

A Yes.

* * *

Q We'll start out initially with just your basic summary and conclusions if we could and then we'll take them individually.

A Well, in summary, I found him to be a chronically psychotic and brain damaged person who also had severe learning disabilities and I mention that his func-

tioning was further compromised because he had used alcohol or drugs and I also talked in my conclusion about the effect of Mr. Hall being the victim of what I believe extraordinary physical abuse during childhood and had also been the witness to extreme family violence and that this combination of his severe psychiatric and neurological and intellectual vulnerabilities or impairments, coupled with that kind of upbringing, contributed to his impulsivity.

* * *

[A] My recollection is also I think more than one of the siblings said that when the mother beat him, he was always naked and it sounds—it sounded to me as if the mother had been very, very seriously psychiatrically disturbed in kind of bizarre torture.

Q How would that have impacted Mr. Hall?

A. Well, I would say, several ways. First of all, abuse, we don't know exactly what she did but abuse, itself, can have an affect on the brain. You know, if you bat a kid around and if he's hit in the head enough or even hard enough once, you can cause injury to the brain, you can cause physical injury that way and brain injury as such usually leads to increased impulsiveness to an inability to control behaviors, a tendancy to react very, very quickly.

* * *

Q Is it your medical opinion to a reasonable degree of medical certainty that Mr. Hall suffers from brain damage?

A I think he does.

Q Is it likewise your medical opinion to a reasonable degree of medical certainty that he is learning disabled?

A Yes.

Q Thereby somewhat mildly retarded?

A You know, when you say mildly retarded, these are terms that are used in the field to define stages of functioning and severe retardation would be an individual who couldn't even feed himself, who had to be, you know, who was perhaps in bed or sitting on a floor and everything had to be done for him. And so the term mild retardation is really not mild.

I think that he functionally would have great difficulty taking care of himself or just going about the everyday work of feeding himself, looking out for his own needs. For us, I think we would call it significantly retarded, but it's simply because, in terms of scores, there are people who are even more retarded who cannot function.

Q Let me state it and you correct me if I'm wrong so that I'm sure I understand. Being retarded is extremely bad. Mildly retarded in terms of psychiatric and psychological language is still very poor, intellectually very poor, but it's a way of differentiating between mild, moderate and severe in terms of professional psychologists or psychiatrists.

A Yes. I should also say it is really bad, worse, because of the brain injury and the psychotic thinking. So that, if you were only dealing with an intellectual problem, an individual might be able to function better. But when it is complicated by brain damage and by psychosis, then the person really cannot function as an adult.

* * *

Q We kind of glossed over it. I want to cover one other aspect and then I'm just about through. You talked about his speech problems.

A Yes.

Q Describe those for us, if you could, please, ma'am.

A My recollection is that he was extremely difficult to understand. It was a kind of speech impediment which is what, I guess in psychiatry, you think of as a soft neurological sign. Again, another evidence of brain dysfunction that, rather than evidence of let's say retardation, this kind of slurring of speech and inability to articulate words or to be understood was again a sign of brain dysfunction.

Q Did you spend enough time with him to satisfy yourself that that was a result of organic brain problems, as opposed to some cultural problem that he might have had?

A Sure. Because we saw other people there in the south and you could understand their speech. The other thing is that it was—this persisted in his mode of acting by all of the exams.

Q Is it your opinion that Mr. Hall suffers from a learning disability?

A Yes.

Q Is that a long standing learning disability?

A Yes. In fact, that hardly does justice to it, when you say a learning disability. He has such severe impairment that he really, you know—when you think of a learning disability, we tend to think of someone

who just can't read or had dyslexia. He is so profasively damaged that to call it a learning disability doesn't do justice to him.

* * *

DR. JETHRO TOOMER

Q Can you state your name please.

A My name is Jethro Toomer.

Q And how are you currently employed, sir?

A Presently I direct the graduate program in mental health counseling at Florida National University in Miami and I'm also on the staff at Harvardview Hospital (phonetic), which is a private psychiatric facility.

* * *

Q Dr. Toomer, did you have an occasion to conduct an evaluation on Freddie Lee Hall?

A Yes, I did.

Q And when did you do this evaluation?

A My evaluation of Mr. Hall was conducted on August 18th of 1988.

Q And could you please describe for us, sir, how long did that evaluation take?

A A little over three hours.

Q Was that enough time, in your professional opinion, to serve the purposes that you were there for?

A Yes, I did, for that part of the process, yes.

Q Could you please describe for us the procedure that you went through in that evaluation period with Freddie Lee Hall.

A The procedure for conducting the evaluation involved a number of steps. First there's what we call the clinical interview or the psychosocial history. And what we do as part of that is we ask the individual to give us a chronological accounting of events that have occurred in his life from birth up to the present time. And what we use that for is not just—not solely for the collection of information, but we use that also to look at certain clinical aspects of behavior.

For example, we look at what the person—if there are any issues that the person evades. We look at any unusual emotionality related to specific topics. We look at how the person responds to giving certain information. We look at whether the information is relevant. We look at whether there are any gaps or whether—in the information provided or whether the person is able to provide a logical, coherent accounting of events that have taken place.

So, we look not only at what the person says, but what the person doesn't say. We also look at nonverbal behavior and what have you, as part of that. That's one piece.

Following that is usually the process of testing, that is administering a number of tests or instruments to gauge various dimensions or various aspects of functioning. In this particular case we utilized first of all—not necessarily in this order, but we utilized the Revised Beta Examination, which is an IQ test to gauge intellectual functioning.

The next instrument that was utilized is the one that's called the revised—that's called the Bender-Gestalt Design, which is an instrument that's designed to—as a screen tool that points out various areas of personality dysfunction and also provides an indication

as to whether there is any organicity, or what we call brain damage.

Next there is an instrument we utilized that's called the—the Dematic Apperception Test, which is a projected test where the individual is shown pictures and is asked to respond to create a story about the picture. We use that to discern the—the person's level of functioning. In other words, whether the person is able to—to—is creative, whether the person is able to engage in abstractions in terms of creating a story, what kind of themes are emphasized, or what have you.

So, those are the basic instruments that we utilized.

Q Having described those tests, Doctor, could you go back and tell the jury what the results were of those tests that were administered to Freddie Hall?

A Yes. As I indicated, one of the instruments was the Bender-Gestalt Designs. The Bender-Gestalt Designs is the instrument that's utilized to point out areas of personality dysfunction. It's also utilized to point out whether or not there is a likelihood of organicity or brain damage. And with respect to Mr. Hall, his production with respect to this particular instrument pointed out that there was organicity, that there was brain damage in terms of his particular functioning.

That particular instrument requires an individual to utilize both visual cognitive as well as motor functions and he was inadequate along all of those dimensions, indicative of brain damage. Also the individual is asked, for example, to recall those particular—certain particular portions of the instrument, because the instrument is made up of a series of designs that the person has to duplicate, and the person—

immediately upon completing that, once the instruments have been—the designs have been put away, the person is asked to simply recall the designs and he could not do that, which is further indicative of brain trauma or brain damage. That was the Bender-Gestalt Designs.

Now, the instrument designed to gauge intellectual functioning is the instrument that was referred to called the Revised Beta Examination and that instrument is utilized because it takes into account and does not factor into the derived IQ score, what we refer to as cultural bias. May IQ tests focus on information that an individual may have access to or may not have access to or may not have access to.

The Revised Beta Examination looks at visual motor function and IQ is based upon, not the possession of cognitive data or information or facts, but the ability to manipulate symbols utilizing both visual as well as cognitive—the person's visual as well as cognitive apparatus. And on this particular test, the Revised Beta Examination, Mr. Hall's testing score, his IQ test, came out to sixty, which is very low, which is significant in terms of reflecting very severe deficits in in intellectual functioning and basically categorizes him as mentally retarded.

Q Doctor, let me stop you here before we go to the other tests. In part of your overall evaluation did you have the opportunity to review other data and materials in Mr. Hall's case?

A Yes, I did.

Q Among those data and materials were there other tests and other reports?

A Yes, there were other tests that had been conducted.

Q Are you aware of other IQ testing that was done?

A Yes.

Q Was that score different than the score that you came out with on your beta exam?

A Yes, there was some differences. I believe one IQ test revealed an IQ score, or an intellectual quotient, of eighty, as opposed to the sixty that I derived.

Q You—as a professional psychologist, sir, are you able to resolve the differences between those IQ scores?

A Yes, I don't have a problem with the difference in the respective IQ scores that I alluded to earlier. A lot of IQ tests reflect and focus on what one has been exposed to. The IQ tests that I—and let me go back, what one was been exposed to and what one has been exposed to oftentimes is influenced by culture and what have you.

It's—for example, if you were to ask an individual on an IQ test, say an individual who had been raised primarily in the city, if you were to ask that person on an IQ test to respond to items about country life, then based upon that particular test and that person's responses, that person's going to come out on the low end of the scale.

Another example would be if you took an individual and just denied that individual the opportunity to have access to information and then tested the individual on that information, then that individual's going to come out low on the scale.

The Revised Beta Examination does away with a lot of that because it does not test the acquisition of data, of information. The individual, on the Revised Beta Examination, is required to manipulate symbols, to look at and manipulate designs, to carry out certain motor functions which look at the—which, when done correctly, indicates that the person is functioning appropriately in terms of visual and in terms of motor functioning.

Q So, Doctor, they were were different tests?

A They were different tests, yes.

Q Could you go on and explain the—for the jury please, the results of the other test. I believe you had two or three more.

A Okay. The revised—we talked about the Revised Beta Examination and the Bender-Gestalt Designs. I indicated earlier that I also administered what we call a sub-test or a subset of the Wexler Adult Intelligence Scale and the subset of the Wexler Adult Intelligence Scale is designed primarily to assess the degree to which or the level at which an individual is functioning in terms of his or her reasoning ability.

The individual is given certain proverbs and is asked to interpret those proverbs. Ones ability to interpret those proverbs provides a measure or an indicator as to whether or not an individual's ability to reason is basically what we call concretistic.

For example, children reason in very concrete fashion. They aren't able to take intangible data and manipulate it. What they basically do is they are able primarily to function with what they can see. That's what we mean when we talk about a person reasoning

concretely. Words and statements are taken literally. That is an example of a person who reasons concretely.

For example, an example of some of the proverbs that an individual is asked to interpret on the subset of the Wexler Adult Intelligence Scale is, what do we mean when we say that people who live in glass houses should not throw stones? Okay. That is an example of a proverb that an individual is asked to interpret.

Oftentimes that you get when individuals are functioning at a very concrete level is that, if you throw a stone you will break the glass. You see, that is a very concrete, very literal interpretation of that proverb. A more abstract response to that proverb would be something along the lines that, individuals should pay attention to their own behavior and not be as—you know, so quick or rush to judgment upon other people. That would be a more abstract interpretation of that particular proverb.

Q Doctor, how did Freddie Lee Hall do? Or what were the results of that particular test?

A He had significant difficulty understanding the proverb or responding in any way, shape, form, or fashion that approached what you might call abstract reasoning or abstractions.

Q Was that result consistent with the results of the other testing that you've previously talked about?

A Yes, it was consistent and in a number of the other tests that same kind of behavior was manifested, where responses were irrelevant or not in keeping with the particular question that was asked or response that was sought.

* * *

Q Did you see, in your evaluation of Freddie Lee Hall, any signs of malingering?

A I did not find, as a result of my evaluation, any signs or indication of malingering.

* * *

Q Now, Doctor, we've talked about some of the other data that you had an opportunity to review then—were you able to review as part of your evaluation any information regarding Freddie Lee's family and background?

A Yes, I had the opportunity to look at statement that had been provided by family members and also to interview one family member.

Q Who was that family member?

A That was his—the oldest sister in the family, Deanna.

Q Could you relate please—did you see that information in reaching your conclusions that you're testifying about here today?

A Yeah, all of that information was served to corroborate the findings that I'm presenting here, yes.

Q Is that the type of information that is normally used by people in the field of psychology in reaching and corroborating conclusions?

A Yes. A psychological evaluation—a complete psychological evaluation would consist of the clinical interview that I spoke about a few moments ago, the psychological testing, and data from other sources, interviews with significant others, family members and other individuals who might be able to provide some kind of historical information or behavioral information.

All of that's part of the process of developing the psychological evaluation and the results therefrom.

Q Doctor, based upon all that you've testified about, all that you've reviewed, everything in your evaluation, are you able to form an opinion within a reasonable degree of psychological certainty as to Freddie Lee Hall's mental and intellectual skills and capabilities?

A Yes, I am.

Q Can you please relate that to the jury, generally.

A Basically in terms of his mental skills and capabilities, my diagnostic impression based upon my results is that he's mentally retarded.

Q Were you able, from your testing and again everything that you looked at, to tell whether this—when this mental retardation may have come about?

A Based upon everything that I have been able to—to look at, all the information gathered, the mental retardation, as well as other attentive problems have been of longstanding.

Q Doctor, could you briefly again state as to your term mental retardation the general definition you were using and specifically how you're using that term in regards to Freddie Lee Hall.

A When we talk about mental retardation we're talking about an individual whose functioning is incapacitated by virtue of intellectual deficits. In other words, the individual is unable to engage in certain kinds of cognitive processes, thinking processes, because of certain deficits.

Now, what we further mean with respect to that is this, individuals who are, quote, unquote, nor-

mal, and when we say, normal, let's talk about what we consider to be a normal IQ. Normal IQ's are considered to range anywhere from ninety to one fifteen, one hundred and fifteen. And with IQ functioning—with IQ functioning on the part of an individual, the individual is able to carry out certain kinds of activities, thinks in a particular way, is able to process information.

For example, at a very young age children reason and think concretely. Their thinking is centered around basically what they can see. As they grow older and as their intellectual level develops and increases and intellectual function increases, their thinking becomes more abstract, they're now able to consider more complex ideas, they're able to manipulate intangible ideas and data and what have you. And so what happens is as an individual develops intellectually, the individual is able to carry out certain kinds of functioning and thinking processes.

When an individual is mentally retarded, such as reflected in an IQ score of sixty or eighty or what have you, what you have happening is that the individual is unable to carry out certain of those functions. And what you have basically is an individual who develops physically, but who does not develop mentally, cognitively. So, the kinds of things that you—behavior, thought processes that you would expect from someone who is say twenty years of age, twenty-five or thirty, just does not occur.

For example, as individuals get older they are able—as a result of their intellectual development they are able to do things like consider alternatives to certain action, they are able to engage in long-range planning, you know, what I'd like to do or be doing three years from now, three months from now, six years from now. Long-range planning. They're able to consider alterna-

tives. They're able to engage in activities that are goal directed that will help them achieve those particular ends. They are able to weigh alternatives, consequences, assess consequences, if I do this, this will be a consequence. If I do this, that will be a consequence. If I do this, this will be in my best interest, and what have you.

Q Doctor—

A With deficits they are unable to do that.

Q Doctor, that definition you've just given the jury, does that fit Freddie Lee Hall?

A It does exactly.

Q No, in—when we're talking the term retarded, are we talking just solely IQ scores?

A No. No. Retardation is measured. The indicator that we use with respect to retardation, the indicator is the IQ score. You know, functioning along a particular dimension, achieving a certain score. But retardation is what we look at. When we look closer at retardation, retardation is a function of a number of dimensions.

When we talk about retardation we can look, for example, at how does this manifest itself? How does it occur? Well, retardation can come about as a result of a number of factors. For example, difficult delivery. A difficult birth delivery can lead to retardation. A cut off of supply of oxygen to the brain during a difficult delivery can cause retardation. Repeated head trauma can be another cause of retardation. Physical abuse can be another factor in terms of retardation.

So, there are all different kinds of factors that come into play that affect this dimension that we're talking about with regard to retardation.

* * *

DR. KATHLEEN HEIDE

Q Good afternoon. Will you please state your name for the record.

A Yes, Kathleen Heide. It's spelled H-e-i-d-e.

Q And what is your occupation please?

A I'm a criminologist and an associate professor at the University of South Florida in Tampa.

* * *

Q Thank you. Do you hold a license in the State of Florida?

A Yes, ma'am. I'm licensed in the State of Florida as a mental health counselor.

* * *

Q Would you describe for the jury the assessment interview that you conducted with Freddie?

A Yes, it's rather extensive. It's a three-hour interview and during that time what I do is I look at things that make sense in terms of the offense, I look at the actual, in this case, homicides and I would also look at the processing, what happened to him through the criminal justice system.

Then in addition to just the offense, I want to get a sense of what the defendant is like as a person, so I will ask him questions dealing with childhood, dealing with his family, dealing with activities, with girlfriends, with school, with alcohol involvement, drug involvement, work history, school history. The key—what I'm trying to do is get a sense of what he is like not only in terms of criminal behavior, criminal history, but of what he is like as a person.

* * *

Q What conclusions or opinions did you reach as a result of this personality development assessment, Doctor?

A Well, what was clear in talking to him was he functioned at a low level. Very simple minded. He was—for example, he thought in black and white dimensions. Very simple things. Things were—he was very concrete. For example, I asked him, you know, what are some of the people in prison like? Tell me about your friends. He said all his friends were the same. I mean, that's how he sees them. He doesn't see any difference with his friends.

He was not capable in terms—of thinking in terms of feelings or what was going on inside, so answers were restricted meaning. He couldn't tell me what—what was going on inside, his feelings or his needs or motives in his behavior. He doesn't know that for himself, but then he couldn't tell me what it was like for anybody else. In other words, he is very event oriented, so if I asked him what happened, this happened and this happened and this happened, but in terms of what's in—you know, what's he thinking, what's he feeling, it's not a way that he is comfortable talking. He is not at that level.

He didn't see himself as accountable for his behavior. He's not gotten to the point where he realizes that there are choices available to him, so he sees things that happen sort of as others—sort of like the fault of others. Not only blame others, but circumstances and the reason is there. He is not on a level where he's come to see that he's sort of in charge of his whole life.

In terms of developments, human developments, he functions on a level that's much younger than one would expect even of an adolescent. So, when he was explaining things to me it was in many events, answers, I would hear from somebody that was a child or a very immature adolescent. Certainly not what I would expect or what would normally be found among the mature adult.

Q So, Doctor, what you're saying is the person that you were evaluating was in fact a young child in an adult male body?

MR. TATTI: Object. Leading.

THE COURT: Sustained.

You need to re-ask the question.

Q Explain again what you mean by the last description of the immaturity as it related to the—the physical age of Freddie Hall.

MR. TATTI: Your Honor, that's been asked and answered.

THE COURT: I'll allow the witness to answer the question if she can.

A In terms of the way he struck me—and I hope I'm being responsive to the question—the way he struck me was of somebody who was developmentally much younger and if I put it in these terms it might be easier to think of. They system that I use in terms of personality development, there are several stages that go from one up to seven, at least, in terms of theory. And in terms of when you think of the lower stages, the ability, I classified him as a level three, for example, in personal maturity level. So, he's at this level, the level that one would expect every one of us would go

through that level, but hopefully in terms of human development and maturity we would go beyond that.

So, the level that I'm talking about, level three, one typically starts to see in terms of individuals at the toddler stage, when they're starting to learn formulas, how to make it in the world and we start to teach them—as an example, you don't—to say please and thank you, and it was at that very basic level of not getting further than that. So we see that level typically with toddlers.

By the time an individual starts to get into late childhood or early adolescence we would expect that they would see themselves in terms of accountable for their behavior. They recognize there were choices available. So, I would put him in that—that age of basically a child. Adolescence is actually the tops, early adolescence, but more in a childhood way of seeing thing. Very basic. Very concrete.

* * *

Q Doctor, how would Freddie's personality and psychological deficits have impacted on him on the day of the offense, that being February 21st, 1978?

A His personality development, as I suggested, was very limited—or it was low. His way of seeing things was very limited. He was also very impulsive. This is somebody who is not capable of long-term planning. He's not evaluative. He's not gotten to that point.The best way of thinking of him is somebody who could be carried along by events. Who, because of those deficits or that limited personality development, is sort of flying by the seat of his pants. Just kind of going through things.

* * *

EXCERPTS OF 1997 SENTENCING HEARING

DR. MARK L. ZIMMERMAN

Q. Doctor, please state your name for the record.

A. Mark L. Zimmerman.

* * *

Q. What is your profession?

A. I'm a psychologist.

* * *

Q. Do you recall when you saw Mr. Hall?

A. It was in 1995. If you wait a moment I can tell you the exact date. (The witness referring to documents) May the 12th.

* * *

Q. Can you tell us what type of evaluation you conducted on Mr. Hall?

A. I looked at his cognitive functioning. I had intended to explore the possibility of psychotic symptoms with him.

But as I looked at his cognitive ability, I didn't see that there was any signs of a problem. And the personnel at the prison facility gave me information that he was on neuroleptic medication which would have eveliated any symptoms that he had.

Q. When you talk about cognitive functioning, what does that mean?

A. Well, in layman's terms, I look to see what his IQ was and whether or not he has brain damage.

Q. What did you find his IQ to be?

A. It measures intelligence. On the Westward Full Scale of seventy four.

Q. Can you explain what the Westward is?

A. The Westward is an intelligence scale. It is a test with a long history originating from the Westward of Bellvue Scales (phonetic) in the early part of this century.

From what they created Westward Adult Intelligence Scale Revised. It is probably the most utilized intelligence test in the United States.

Q. What were the results?

A. As I said, his full scale which is, well, let me stop and let me describe this test before I go on.

The test is broken down into two general areas: One is verbal ability. In essence it measures many of the things that we learn in school.

Generally information, ability to deal with abstract concepts and performance tests which are nonverbal test of similar material. But they are nonverbal. They are less influenced.

So we get a verbal score, a performance score and a full-scale score. Plus we get what is called a scale score on each of the eleven sub tests.

And on this, he had a verbal scale of seventy three. A performance score of seventy seven and a full scall score of seventy four.

Q. Which means his overall IQ was seventy four?

A. His overall IQ was seventy four, yes.

Q. Where would it fit in as far as normal?

A. We have a real problem with cut-off scores. We look for a person who is two standard deviations away from the norm as being retarded.

In other words, in the lowest three percent of the population. And we have a range of seventy five and down because of standard measurements and other things.

He would fall in that area where we would seriously be concerned about mental retardation. And therefore, to follow up, one has to find out his level of function.

Now level of functioning in a structured environment, such as a prison or a hospital, will not give you that information. So I had to speak to family members to determine whether he was retarded or not.

Q. Level of functioning means what? Functioning in the adult world? Function in where?

A. In the real world. What we would call the real world. Can a person arrange transportation from place to place. Can the person handle money? Can the person make arrangements for his daily living, cook food, making sure there is food available.

Q. And what did the interview with Mr. Hall's sister tell you about his functioning level?

A. His functioning is somewhat lower than I have estimated. He has never handled money well. He has always had other people help him with money.

The only real work he has done was, I am not sure exactly terms, what we would call the picking crew. Where they follow the crops and harvest the crops.

And he had a man there that ran the crews, that pretty much looked after his money and looked after him and as best as I can tell Mr. Hall never really functioned as an adult.

Q. Can you tell us what other tests you performed on Mr. Hall?

A. Yes. I also administered the wide-range achievement test. Which is a test, to test the person's ability to read, spell and do arithmetic.

Q. How did Mr. Hall come out there?

A. He was found to read and do arithmetic on a second grade level and spell on a third grade level.

* * *

Q. What can you conclude based on these test?

A. I think Mr. Hall is mentally retarded and brain damaged. And it is possible that he suffers from psychosis.

Q. Is that consistent with other experts who evaluated Mr. Hall in the past?

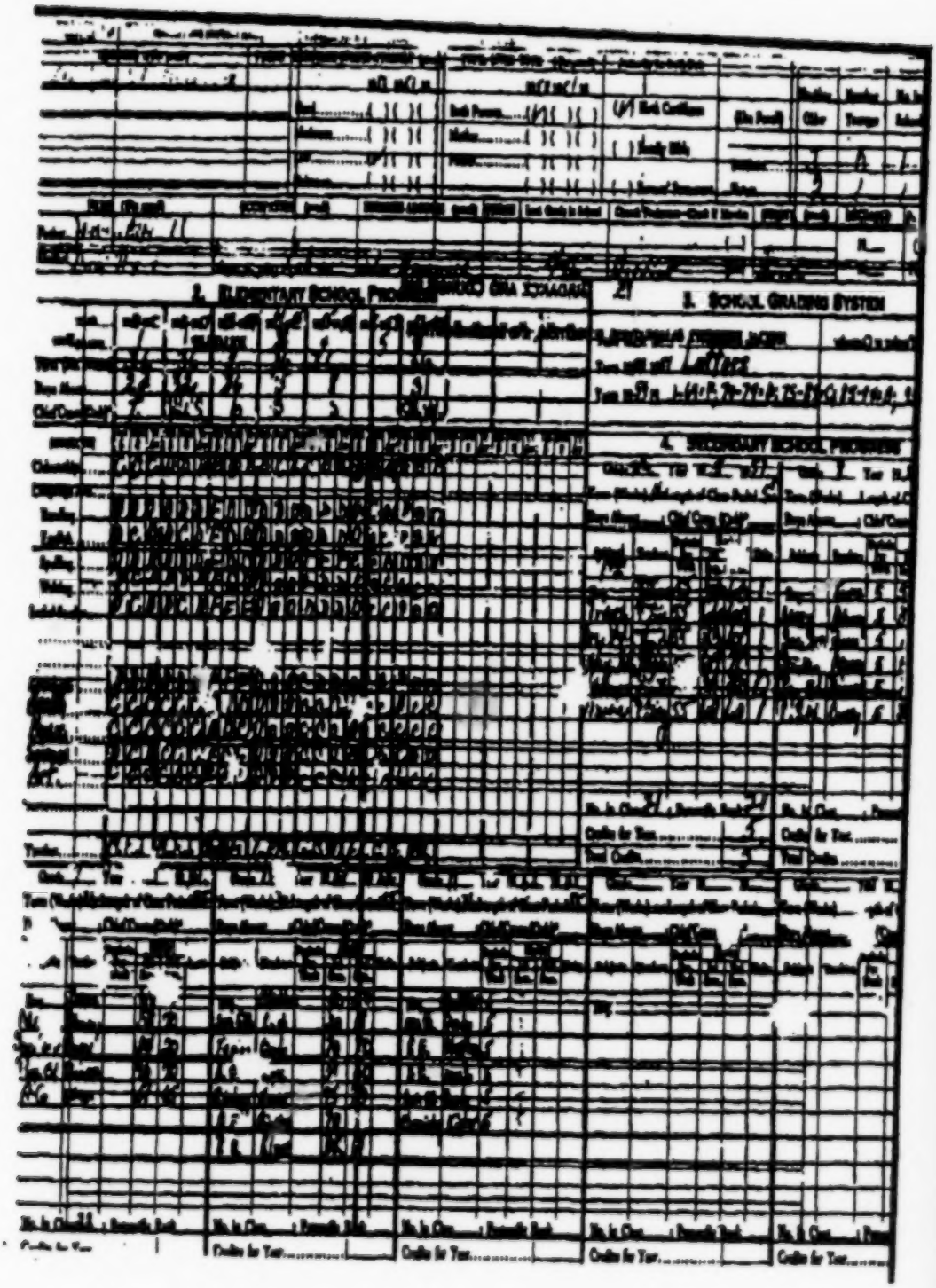
A. Yes, ma'am.

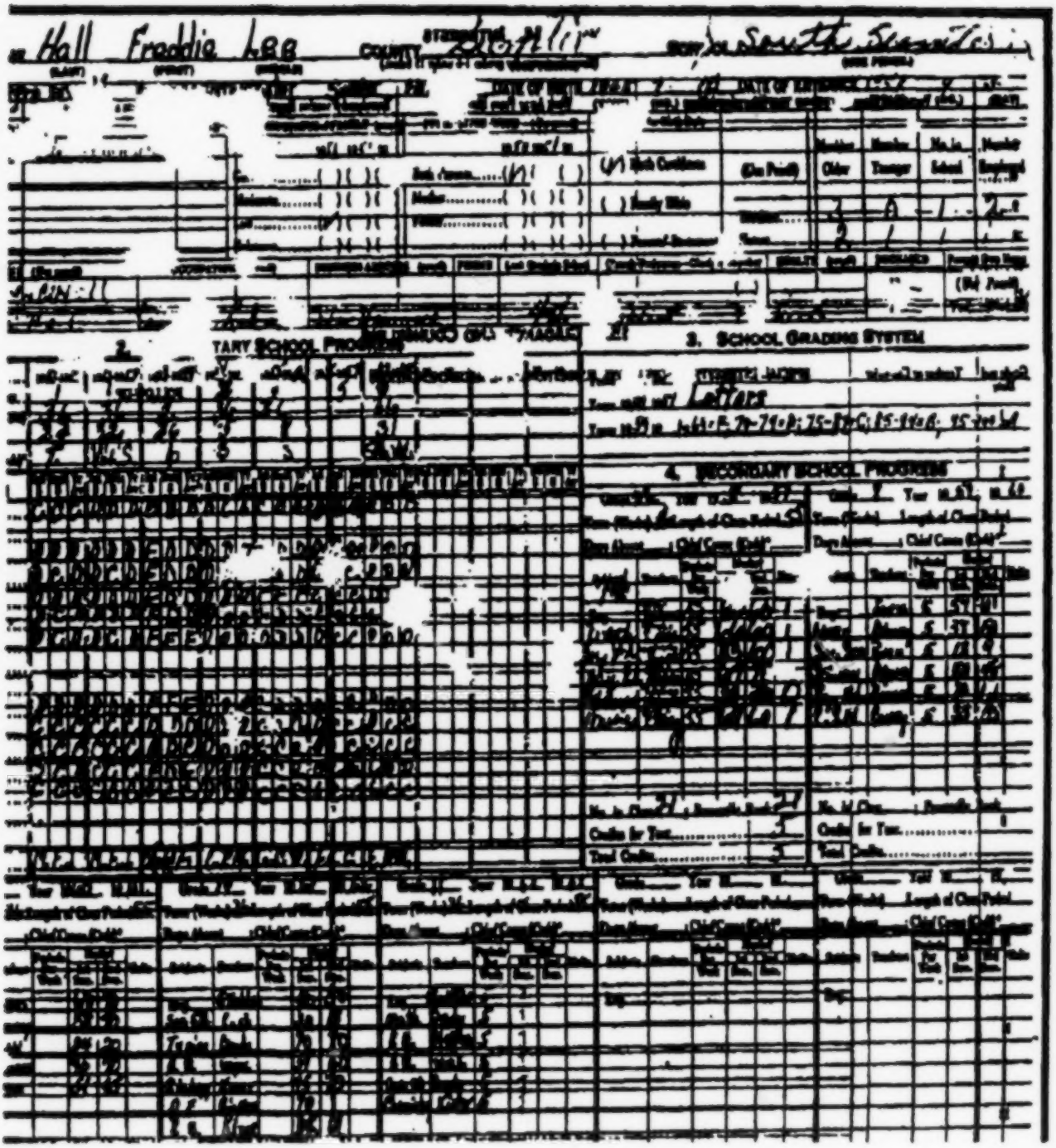
* * *

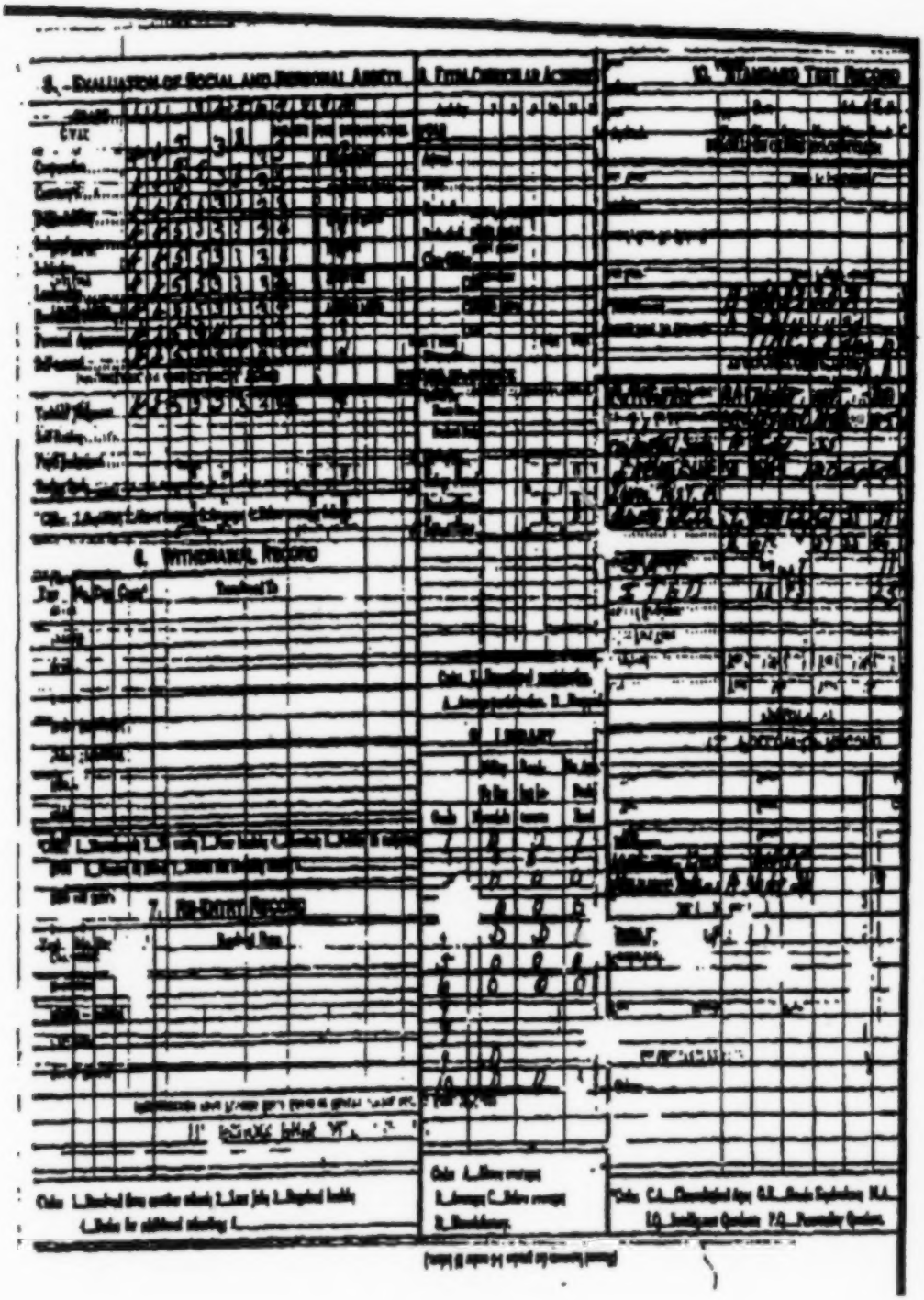
Vocational Plans	Educational Plans	Work Away From Home	Travel and Vacation Experiences	Special Interests and Hobbies	Home Room Teacher

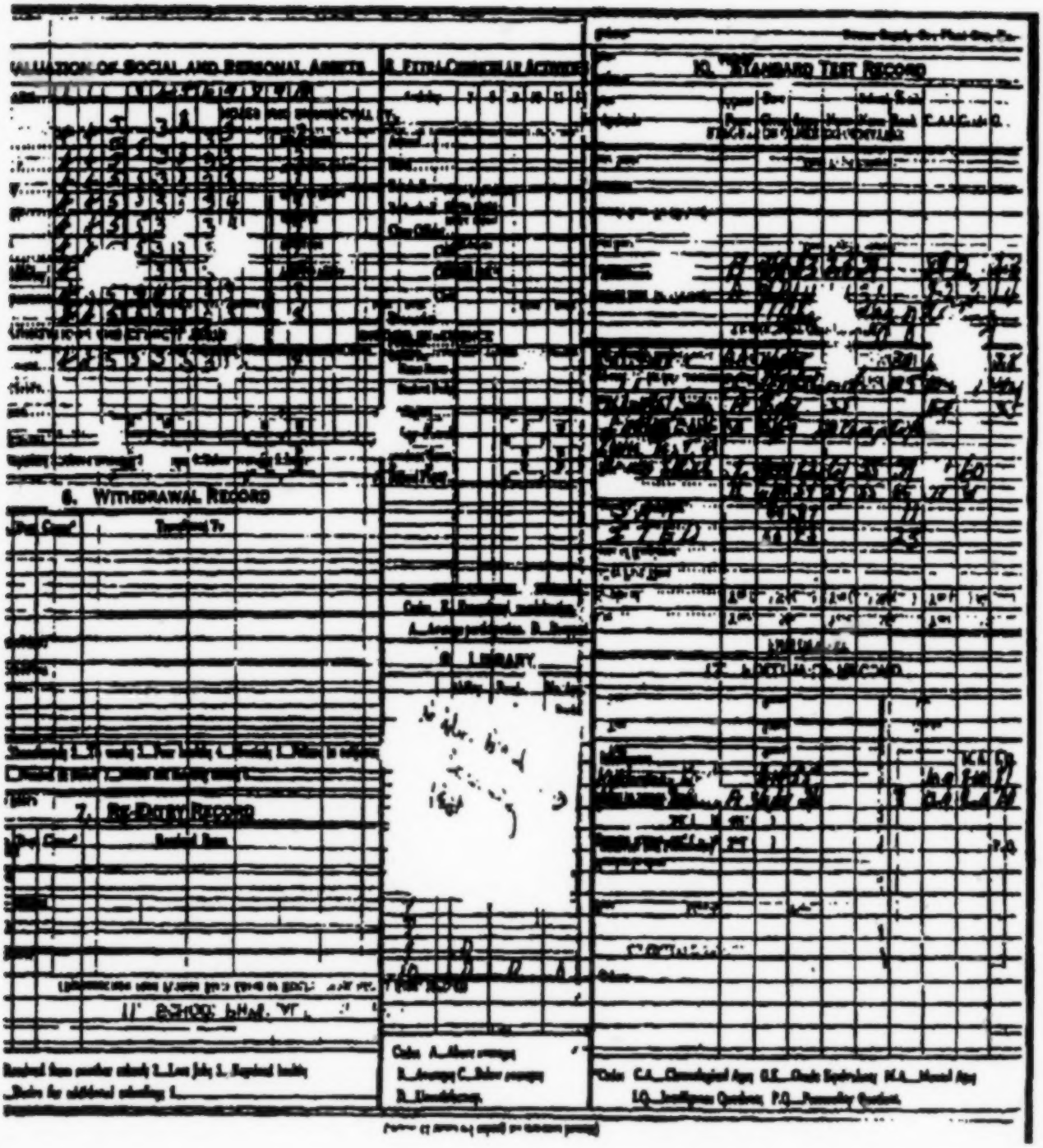
15. G ANCE AND COUNSELING

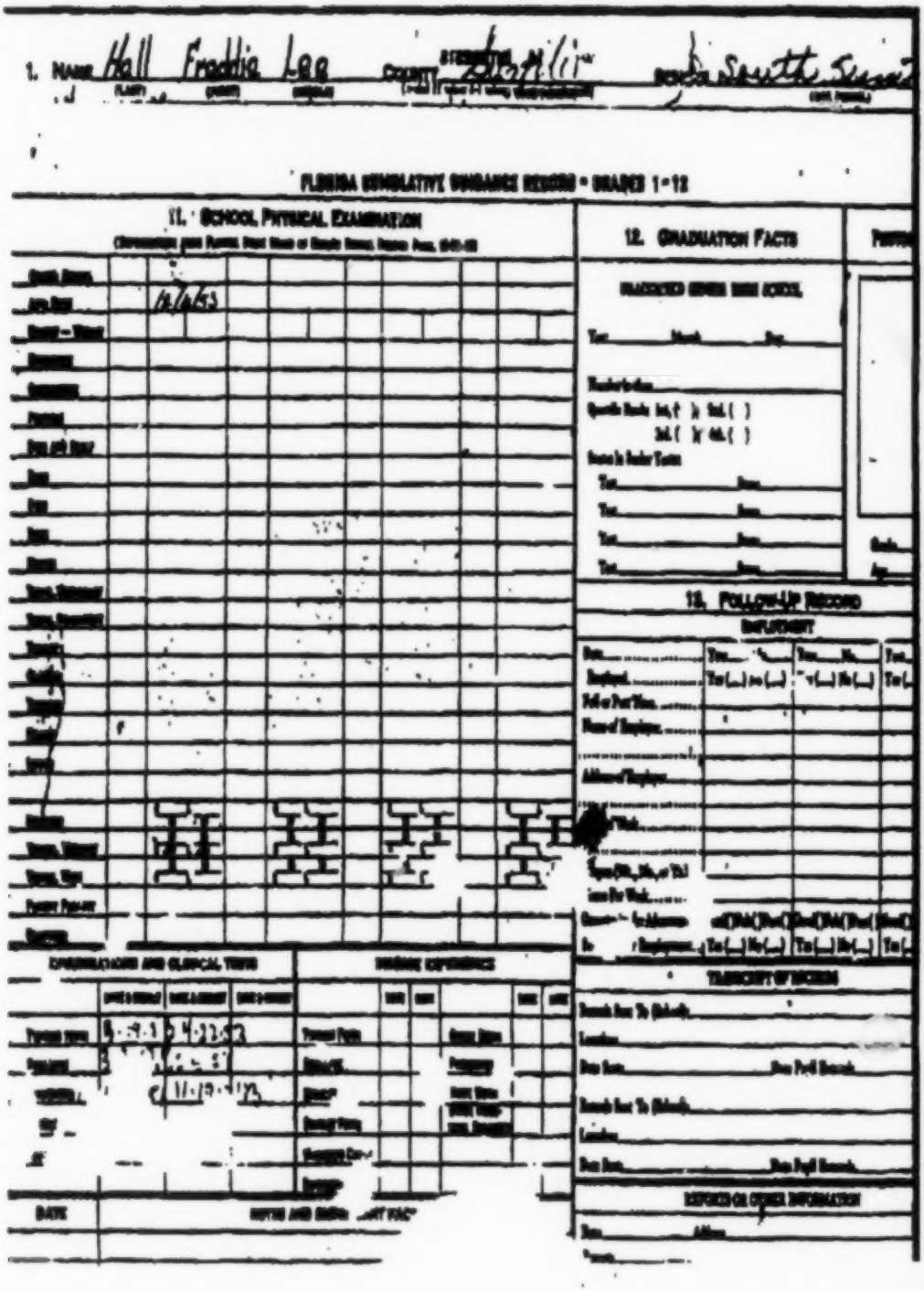
Teacher or counselor	SPECIAL INTERESTS, OBSERVATIONS, SUGGESTIONS, AND RECOMMENDATIONS	FOLLOW-UP	Date
N. E. Johnson	His mental maturity is far below his chronological age. I have found reading to be very in-	Providing [illegible] that will increase his mental achievement.	[illegible]
N. E. Johnson	attention and extra [illegible] comprehension. He is slow in all of his work	Special teacher	
E. D. Higgs			
E. P. Moore	Mentally retarded.		[illegible]
D. Cate Wm	Reading in [illegible] in all phases of work. Mentally [illegible]		
A. C. Gainey	Mentally Retarded	Special teacher	
E. P. Moore	Mentally retarded	" "	[illegible]
E. E. Abney	" "		




Hall Freddie Lee
Letters







1. NAME Hall Freddie Lee
FLORIDA CUMULATIVE GUIDANCE RECORD • GRADES 1-12
11. SCHOOL PHYSICAL EXAMINATION
12. GRADUATION FACTS
13. FOLLOW-UP RECORD
EMPLOYMENT
EXPERIENCES AND CLINICAL TESTS
HOBBIES AND INTERESTS
TRANSCRIPT OF RECORDS
REFERENCES OR OTHER INFORMATION

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

No. 12-10882

Supreme Court, U.S.
FILED
DEC 16 2013
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

FREDDIE LEE HALL,

Petitioner,

v.

FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether Florida's statutory scheme for identifying defendants with mental retardation in capital cases—which, as interpreted by the Supreme Court of Florida, categorically bars defendants who do not have an intelligence quotient (IQ) test score of 70 or below from demonstrating mental retardation and precludes consideration of the standard error of measurement for IQ tests—violates the Eighth Amendment prohibition on the execution of persons with mental retardation as articulated in *Atkins* v. *Virginia*, 536 U.S. 304 (2002).

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IN THE

Supreme Court of the United States

No. 12-10882

FREDDIE LEE HALL,

Petitioner,

v.

FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR PETITIONER

INTRODUCTION

Petitioner Freddie Lee Hall was convicted and sentenced to death in 1978 for his part in the abduction and murder of a twenty-one-year-old pregnant woman. Hall was, and is, a person with mental retardation.[1]

Hall's family recognized his disability when he was a small child. His elementary school teachers repeatedly classified him as "[m]entally retarded" and in need of

[1] The term "intellectual disability" has replaced the term "mental retardation." *See* Schalock *et al.*, *The Renaming of* Mental Retardation, 45 Intell. & Developmental Disabilities 116, 116 (2007). To be consistent with *Atkins* and the record in Hall's case, however, this brief generally uses the term "mental retardation."

a "[s]pecial teacher." JA528. For decades, psychiatrists and psychologists have consistently diagnosed him with mental retardation. Indeed—before this Court decided *Atkins* v. *Virginia*, 536 U.S. 304 (2002), and Hall's mental retardation became a constitutional barrier to his execution—the Florida courts found that Hall had been "mentally retarded his entire life." JA46 (italics omitted). Yet Hall faces execution because his obtained IQ test scores, while within the clinically recognized range for a diagnosis of mental retardation, are above a rigid cutoff point of 70 established by the Florida Supreme Court—a cutoff point the court has admitted is inconsistent with accepted clinical practice. Florida's rule cannot be reconciled with this Court's holding in *Atkins* that the Eighth Amendment forbids putting to death persons who, "[b]ecause of their disabilities in areas of reasoning, judgment, and control of their impulses, ... do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." 536 U.S. at 306.

Hall suffers from precisely such disabilities, and has since early childhood. He has very limited intellectual functioning and short-term memory, he experienced serious childhood developmental delays, and he has a profound speech impediment that makes it difficult for him to communicate with others. Hall failed in school and dropped out of high school after several years of being "socially promoted." To this day, he is illiterate and cannot perform basic arithmetic. He has never been able to cope with the basic day-to-day requirements of adult life. When he occasionally found work as an unskilled laborer, he could not hold onto his wages, which he would give away to his "friends." His family described him as gullible and a follower. Even as an adult, he preferred the company of young children

because he could not understand adult conversation and activities. His trial counsel testified that Hall was unable to assist in his own defense.

In short, Hall has "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others," *Atkins*, 536 U.S. at 318—diminished capacities that *Atkins* held require that persons with mental retardation be exempt from the death penalty.

Yet the Florida Supreme Court refused to consider this abundant evidence of mental retardation, on the ground that, to be diagnosed with mental retardation under Florida's capital statutory scheme, Fla. Stat. § 921.137 (2012), a defendant must show that he obtained a score of 70 or below on an IQ test. JA121-123; *Cherry* v. *State*, 959 So. 2d 702, 712-713 (Fla. 2007) (per curiam). That rigid IQ test score cutoff is flatly inconsistent with the universally accepted clinical definition of mental retardation and with basic statistical principles, which recognize that any IQ test score must be interpreted in light of the standard error of measurement (SEM) inherent in the test.

Simply put, IQ test scores are not perfect measures of a person's intellectual ability. It is thus well-established—as this Court itself recognized in *Atkins*, 536 U.S. at 309 n.5—that a person who obtains an IQ test score between 70 and 75 may be diagnosed with mental retardation, depending on the other clinical evidence supporting the diagnosis. Hall is an example: He has been consistently diagnosed with mental retardation while obtaining IQ test scores in the low 70s. Under Florida's rule, however, defendants like Hall, who

have mental retardation according to the accepted clinical definition of the condition, are nonetheless categorically excluded from the constitutional protection against execution of persons with mental retardation.

Florida's clinically arbitrary bright-line rule—under which a person with an IQ test score of 71 may be executed notwithstanding a consistent diagnosis of mental retardation—flouts the constitutional principles this Court recognized in *Atkins*. As this Court made clear, States have leeway to adopt appropriate procedures to enforce *Atkins*'s constitutional guarantee. Nothing in *Atkins*, however, authorizes the States to narrow the substantive scope of the constitutional right itself by defining mental retardation in a way that excludes defendants who qualify for a diagnosis of mental retardation under accepted clinical standards. Yet that is precisely what Florida has done here. The Florida Supreme Court's judgment should be reversed.

OPINIONS BELOW

The opinion of the Florida Supreme Court (JA115-146) is reported at 109 So. 3d 704 (Fla. 2012). The order denying rehearing (JA147) is unreported. The opinion of the trial court (JA98-114) is unreported.

JURISDICTION

The Florida Supreme Court entered judgment on December 20, 2012 (JA7, JA115) and denied a timely petition for rehearing on March 8, 2013 (JA7, JA147). The petition for a writ of certiorari was filed on June 6, 2013. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Section 921.137, Florida Statutes (2012) and Rule 3.203, Florida Rules of Criminal Procedure are set forth in full at 1a-10a.[2] In pertinent part, Section 921.137 provides:

> (1) As used in this section, the term "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities. The term "adaptive behavior," for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community. The Agency for Persons with Disabilities shall adopt rules to specify the standardized intelligence tests as provided in this subsection.

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[2] Section 921.137 was amended in 2013 to replace "mental retardation" with "intellectual disability." 2013 Fla. Laws ch. 2013-162, § 38; *see also supra* n.1.

> (2) A sentence of death may not be imposed upon a defendant convicted of a capital felony if it is determined in accordance with this section that the defendant has mental retardation.

STATEMENT

A. Hall's Lifelong Mental Retardation

The court that sentenced Freddie Lee Hall to death following his resentencing in 1991 found that "Hall has been mentally retarded his entire life." JA46. It also found, among other things, that Hall "suffered from organic brain damage" (*id.*); "suffered tremendous physical abuse and torture as a child" (JA48); was "illiterate" (JA50); and "was unable to cope" with day-to-day life (*id.*). Indeed, abundant evidence elicited at Hall's resentencing and in the *Atkins* proceedings below, including testimony from the numerous psychiatrists and psychologists who evaluated Hall and from many members of his family, compels those conclusions.

Shortly after his birth in 1945, Hall's family knew that something was "very wrong" with him. JA466. Hall differed from other children; he was "slow with [his] speech and ... slow to learn." JA490; *see also* JA466-467. As one of Hall's siblings explained, "[h]e was a person who couldn't think. He couldn't understand[.]" JA492. From the very beginning, Hall's "mind wasn't right." JA471. Hall suffered significant developmental delays: He "walked and talked long after his other brothers and sisters." JA461; *see also* JA466-467, JA489-490. And even when he started speaking, he had "great difficulty" forming words. JA467; *see also* JA490. When he succeeded, his speech impediment was so pronounced that his family could barely understand him. JA467.

Hall received no help for his developmental problems at home, where he and his sixteen siblings were "raised under the most horrible family circumstances imaginable." JA53; *see also* JA18-21. Hall and his brothers and sisters often "work[ed] fourteen hours a day in the fields" and then "c[a]me home to empty dinner plates." JA20. Starved by their mother, they survived by begging for food. JA464, JA469. Hall's mother also viciously abused her children, and Hall himself received the worst of the abuse because he was "'slow.'" JA20. He was beaten "ten or fifteen times a week sometimes." JA461; *see also* JA477. An older brother recounted that "a lot of things that [Hall] ... was accused of [by his mother], he didn't do, and he couldn't defend himself." JA491; *see also* JA19-20.[3]

Hall's school records confirm what his family already knew—his intellectual functioning was very limited, and he could never keep up with his peers. Indeed, Hall's teachers repeatedly classified him as "mentally retarded"—in fourth grade, in sixth grade, in seventh grade, and again in eighth grade. JA483, JA528. His teachers also noted that his "mental maturity is far below his chronological age," that he was "extra slow in comprehension" and "slow in all of his work." JA528; *see also* JA482, JA483. Hall's grades were never good, but they became progressively worse as he grew older, dropping from mostly Cs, Ds, and Fs to nearly all Fs. JA434. Although Hall's teachers recommended that he be placed with a "special teacher," there is no indication

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[3] Among other torments, "Hall's mother tied him in a 'croaker sack,' swung it over a fire, and beat him." JA73. At night, Hall's mother "would strap him to his bed ... with a rope thrown over a rafter. In the morning, she would ... hoist[] him up and whip[] him with a belt, rope, or [cord]." JA20.

that he ever was, or that he received any special help at all. JA483. Hall advanced to the eleventh grade only because he was "'socially promoted,'" and dropped out without ever having learned to read and write or to master basic arithmetic. JA383, JA435.

As an adult, Hall never successfully lived independently. JA435. He was unable to master even basic day-to-day living skills. He could not cook for himself or clean his own clothes and did not bathe regularly. JA201, JA213, JA217-218. He had difficulty understanding adult conversation and activities and spent most of his time alone or with his young nephews and nieces. JA469, JA493-494.

Unsurprisingly, Hall had difficulty finding and holding a job. He managed to find menial, unskilled labor, working for short stints—six months at the longest—as a rock miner and a fruit picker in a crew run by his brother. JA199, JA215, JA435. But he had trouble performing even the most basic job-related tasks. JA200, JA202. Hall also had difficulty managing the limited money he earned. JA216, JA464, JA469-470. If he was paid by "three or four o'clock Friday afternoon," he might not even have "one quarter" left by Saturday morning. JA200. Described as "gullible and easily influenced," he lost money gambling and by "giving ... money to anyone who paid attention to him." JA470; *see also* JA464. As one psychologist who evaluated him put it, "Hall never really functioned as an adult." JA527.

B. Offense, Conviction, And Sentencing

In February 1978, twenty-one-year-old Karol Hurst, who was seven months pregnant, was abducted from a grocery store parking lot, beaten and raped, and

then killed with a single gunshot wound to the head. JA9; *Ruffin* v. *State*, 397 So. 2d 277, 278 (Fla. 1981) (per curiam). The only eyewitnesses to the crime were Hall and his co-defendant, Mack Ruffin. *See* JA9. Hall admitted forcing his way into Mrs. Hurst's car and driving her to the remote location in the woods where she was killed, but maintained he did not rape or shoot Mrs. Hurst. *Id.* Tried separately, Hall and Ruffin were each convicted of murder. JA63. Ruffin, who does not have mental retardation, ultimately received a life sentence. *Id.* n.1. Hall was sentenced to death. JA63.[4]

Hall appealed his conviction and sentence, contending, among other things, that the prosecution had not presented any evidence that he had shot Mrs. Hurst. The Florida Supreme Court affirmed, reasoning that there was sufficient evidence from which the jury could have concluded that Hall aided and abetted the murder and was thus equally responsible. JA10.

C. The Florida Supreme Court's Remand For Resentencing And Presentation Of Mitigating Evidence Of Mental Retardation

At the time of Hall's original capital sentencing, mental retardation was not a statutory mitigating factor in Florida, *see* JA16, and this Court had not yet held that capital defendants in Florida must be permitted to present non-statutory mitigating evidence in the penal-

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[4] After Mrs. Hurst was shot, Ruffin and Hall drove her car to a convenience store that they planned to rob. JA9; *see also Ruffin*, 397 So. 2d at 278-279. During a struggle outside the store, one of them shot and killed a deputy sheriff. JA9. Hall and Ruffin were tried together for that killing and convicted of first-degree murder. JA8 n.1. Hall's conviction was later reduced to second-degree murder due to insufficient evidence of premeditation. JA65.

ty phase of a capital trial, *see Hitchcock* v. *Dugger*, 481 U.S. 393, 398-399 (1987).

After this Court's decision in *Hitchcock*, Hall filed a motion to vacate his sentence pursuant to Florida Rule of Criminal Procedure 3.850. JA15. At the Rule 3.850 hearing, Hall presented substantial non-statutory mitigating evidence of his mental retardation and the brutal abuse he and his siblings suffered. As the Florida Supreme Court noted in summarizing that evidence, several experts testified regarding Hall's "very low intellectual level" and organic brain damage. JA18; *see also* JA19. In addition, the evidence showed that "[t]eachers and siblings alike immediately recognized [Hall] to be significantly mentally retarded. This retardation did not garner any sympathy from his mother, but rather caused much scorn to befall him. [Hall was] [c]onstantly beaten because he was 'slow' or because he made simple mistakes[.]" JA20. Concluding that "[a]ll of this expert and lay evidence proves or tends to prove a host of nonstatutory mitigating circumstances," the Florida Supreme Court vacated Hall's death sentence and remanded for resentencing. JA21.

D. Evidence Of Mental Retardation Presented At Hall's Resentencing

At the resentencing hearing in December 1990 (JA30), Hall presented uncontroverted evidence of his mental retardation.

Testimony of Hall's family. Hall's family testified in detail regarding Hall's childhood disabilities. For example, Hall's brother James testified that "from a child" Hall "was slow with speech" and "slow to learn." JA489, JA490. He "couldn't talk as the others could," and would "pound on something" in frustration at not

being able to "get his words out." JA490. "He was a person who couldn't think. He couldn't understand .... He tried but ... he couldn't get it. It just wasn't there." JA492. Hall's brother Lugene Ellis testified similarly that Hall "didn't understand like the rest of us"; "his mind didn't function like the rest of us." JA495. Other family members and a former neighbor corroborated and expanded on this testimony. *See, e.g.*, JA484-485, JA493-494. Hall's school records, indicating that his teachers repeatedly identified him as "mentally retarded," were also placed into evidence. JA528, JA482-483.

Testimony of Hall's former counsel. Hall's former lawyers also testified. Richard Hagin, who defended Hall in a 1968 case that resulted in a conviction of assault with intent to commit rape, testified that Hall was the only criminal defendant he had ever represented who he believed was not guilty, but that Hall was not sufficiently intelligent to assist in his own defense. JA479. Hagin "[c]ouldn't really understand anything [Hall] said" and, when he asked Hall to write down questions to ask the witnesses, Hall could not. JA480. Similarly, Hall's trial counsel in the Hurst case testified that Hall could not assist in his defense because he had "a mental ... level much lower than his age," that at best Hall's understanding was similar to counsel's four-year-old daughter, and at worst counsel "could not communicate with [Hall] at all." 1991 Record on Appeal, Vol. IX, at 1567.

Testimony of clinicians who evaluated Hall. Hall also presented evidence from a number of clinicians who had evaluated him. All agreed that Hall had mental retardation. Dr. Dorothy Lewis, a psychiatrist and professor of psychiatry at New York University, testified that she led a group of clinicians, including a neurologist, a neuropsychologist, a professor specializing in

learning disabilities, and a graduate student in psychology, who performed an in-depth evaluation of Hall in 1986. JA499. Dr. Lewis noted that Hall "had not had a thorough assessment before that time." *Id.*[5] Based on the results of the assessment, Dr. Lewis concluded that Hall was "extremely impaired psychiatrically, neurologically and intellectually." JA500.

Reviewing the specific tests the group conducted, Dr. Lewis noted that a graduate student had administered the Wechsler Adult Intelligence Scale—Revised (WAIS-R), on which Hall scored 80, putting him "on the borderline of retarded." JA501; *see also* JA446. The student found that Hall was "intellectually limited" and showed "signs of brain damage." JA501. An electroencephalogram showed that Hall had abnormal brain waves, indicating brain dysfunction. JA502. The learning disabilities specialist, Dr. Barbara Bard, found that Hall could not read and that his math abilities were "below the first grade level." JA503. Dr. Bard con-

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[5] Hall had taken two earlier IQ tests. In 1968, Hall scored 76 on a Beta Test, a non-verbal group test, *see* Fabian *et al.*, *Life, Death, and IQ*, 59 Clev. St. L. Rev. 399, 413 (2011), administered by the state Department of Corrections. JA443. In 1979, a Department of Corrections psychologist administered a Kent Test, on which Hall scored 79. JA445. The Kent test is "not a commercially available instrument." *Dimas-Martinez* v. *State*, 385 S.W.3d 238, 255-256 (Ark. 2011) (citing psychologist and noting that the "Kent Test ha[s] not been shown to have any reliability or validity or to have any ability to accurately predict intellectual functioning"). The Wechsler tests—the Wechsler Adult Intelligence Scale (WAIS) and Wechsler Intelligence Scale for Children (WISC)—are widely considered the "gold standard" in IQ testing. *See, e.g.*, Hunt, *Human Intelligence* 12-13 (2011). Indeed, Florida law does not currently permit the use of the Kent or Beta tests to determine mental retardation for *Atkins* purposes, instead requiring Wechsler or Stanford-Binet tests. Fla. Admin. Code Ann. r. 65G-4.011(1).

cluded that Hall "is probably incapable of even the most ... basic living skills which incorporate math and reading." *Id.* The neurologist, Dr. Jonathan Pincus, found that Hall "shows evidence of ... probabl[e] retardation." JA504. The neuropsychologist, Dr. Ellis Richardson, found that Hall had "a borderline intellectual ability" and that his test results were indicative of "serious brain impairment." JA505.

Finally, Dr. Lewis herself evaluated Hall and found him to be "brain damaged," with "severe learning disabilities." JA505. Indeed, Hall "is so [perva]sively damaged that to call it a learning disability doesn't do justice to him." JA509. She also found that Hall showed signs of mental illness. JA507. Dr. Lewis testified that, based on the evaluation as a whole, she believed Hall was "significantly retarded," to the extent that he "would have great difficulty taking care of himself." *Id.*

Dr. Bard testified that she had evaluated Hall as part of Dr. Lewis's team. JA496; *see also* JA502. On a test of academic skills, Hall scored at the level of a first-grader, "consistent with the profile of a mentally retarded adult." JA497. He was unable to look at a sequence of pictures and tell a story—something children can typically do. *Id.* Dr. Bard noted Hall's severe speech impediment and opined that it was "neurologically based." JA498.

Dr. Jethro Toomer, a psychologist, also evaluated Hall, independently of Dr. Lewis's team. Dr. Toomer administered an intelligence test, the Revised Beta Examination, on which Hall obtained a score of 60 (the lowest possible score), in the range of mental retardation. JA512; *see also* JA389 ("Beta I.Q. of less than 60"), JA409. Based on this and other tests and his in-

terview of Hall, Dr. Toomer concluded that Hall was "mentally retarded" and that the mental retardation was "longstanding." JA517.

Dr. Kathleen Heide, a criminologist and mental health counselor, also evaluated Hall independently and explained that "he functions on a level that's much younger than one would expect even of an adolescent" and that his understanding of himself and his behavior was what "we see ... typically with toddlers." JA522, JA523. She testified that Hall's "way of seeing things [is] very limited. He [is] also very impulsive. This is somebody who is not capable of long-term planning.... [He] is somebody who could be carried along by events." JA523.

E. Hall Is Again Sentenced To Death Notwithstanding A Finding That He "Has Been Mentally Retarded His Entire Life"

The jury recommended death by a vote of 8 to 4, and the trial court adopted the jury's recommendation. JA26, JA61. The court readily acknowledged that "substantial evidence ... support[s] [a] finding" that "Freddie Lee Hall has been mentally retarded his entire life." JA46.[6] But the court stated that it was unable to quantify the mitigating significance of Hall's mental retardation. JA46-47. Ultimately, the court concluded that "learning disabilities, mental retardation, and other mental difficulties ... cannot be used to

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[6] The court also found "uncontroverted" evidence of Hall's organic brain damage and "overwhelming" evidence of "abuse and torture as a child" and "tremendous emotional deprivation and disturbance throughout his life." JA46, JA47, JA48 (italics omitted).

justify, excuse or extenuate [Hall's] moral culpability." JA56.

The Florida Supreme Court affirmed. The majority did not dispute the trial court's finding that Hall had mental retardation but concluded that this did not "provide[] a pretense of moral or legal justification" for his crime and was entitled to "little weight" as mitigating evidence. JA69, JA71. Then-Chief Justice Barkett dissented. Because "a mentally retarded person such as Freddie Lee Hall has a lessened ability to determine right from wrong and to appreciate the consequences of his behavior," she would have held that executing persons with mental retardation violated the Florida Constitution's prohibition on cruel or unusual punishment. JA76-77.[7]

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[7] Hall filed a Rule 3.850 motion seeking to vacate his new death sentence, arguing, among other things, that his mental retardation rendered him incompetent to proceed with the resentencing. JA83. At the evidentiary hearing on this claim, two additional psychologists who had evaluated Hall testified. Dr. Harry Krop, who evaluated Hall in 1990, found that he had an IQ of 73 and "probable brain damage," but was competent to be resentenced. JA84. Dr. Mark Zimmerman, who evaluated Hall in 1995, "found that Hall's IQ was 74 and that he was mentally retarded and brain damaged." JA85. Dr. Zimmerman believed that Hall was incompetent in 1995 but could not determine whether he was incompetent at his resentencing in 1990. *Id.* The trial court concluded that "[w]hile there is no doubt that [Hall] has serious mental difficulties [and] is probably somewhat retarded," he was competent to be resentenced. JA87. The Florida Supreme Court affirmed (JA91), although two justices wrote separately to state that they believed imposition of the death penalty on Hall was disproportionate in light of his mental retardation (JA91-97).

F. Post-*Atkins* Litigation And The Florida Supreme Court's Adoption Of An IQ Test Score Cutoff Of 70

In 2002, this Court held that the "mentally retarded should be categorically excluded from execution." *Atkins* v. *Virginia*, 536 U.S. 304, 318 (2002). The Court explained that the "diminished capacities" of persons with mental retardation "to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others" undermined the traditional justifications for the death penalty and made it more likely that persons with mental retardation would be wrongfully convicted and executed. *Id.* at 318-319, 321.

The year before *Atkins* was decided, Florida enacted a statute prohibiting the execution of persons with mental retardation, defined as "[1] significantly subaverage general intellectual functioning [2] existing concurrently with deficits in adaptive behavior and [3] manifested during the period from conception to age 18." Fla. Stat. § 921.137(1).[8] In turn, "significantly subaverage general intellectual functioning" is defined as "performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the [relevant Florida] rules." *Id.* On its face, that definition is consistent with clinical

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[8] Although Section 921.137 applies by its terms only to defendants sentenced after its effective date, the Florida Supreme Court determined, following *Atkins*, that Florida Rule of Criminal Procedure 3.203 allows defendants sentenced to death prior to the statute's enactment to challenge their sentences under the statutory standard. *See Brown* v. *State*, 959 So. 2d 146, 147 n.1 (Fla. 2007) (per curiam).

definitions of mental retardation—which, taking measurement error into account, provide that IQ scores in the range of approximately 70 to 75 can represent performance two standard deviations below the mean (*see infra* Part II.A)—and does not set a rigid IQ cutoff.[9]

The Florida Supreme Court has nonetheless interpreted section 921.137 as barring anyone who does not have an obtained IQ test score of 70 or under from demonstrating mental retardation and as forbidding consideration of measurement error. *See Cherry* v. *State*, 959 So. 2d 702 (Fla. 2007) (per curiam). Cherry involved a defendant with an obtained IQ test score of 72. *Id.* at 711. The Florida Supreme Court acknowledged that, under the standard clinical definitions of mental retardation, Cherry's score should have been interpreted in accordance with the standard error of measurement associated with the particular test at issue, *id.* at 712-713, which would have yielded a range of 67 to 77—a range in which a psychiatrist or psychologist would investigate a person's adaptive functioning before deciding whether to diagnose him or her with mental retardation. Nevertheless, the court held that the statute "does not use the word approximate, nor does it reference the SEM" and that the statute's "plain meaning" therefore barred the court from considering anything other than the obtained IQ test score itself. *Id.* at 713. Cherry's score of 72 was thus the end of the

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[9] Indeed, the legislative staff analysis accompanying the law stated: "The bill does not contain a set IQ level .... Two standard deviations from these tests is *approximately* a 70 IQ, *although it can be extended up to 75*. The effect in practical terms will be that a person that has an IQ of around 70 or less will likely establish an exemption from the death penalty." Fla. S. Staff Analysis, CS/SB 238, at 11 (Feb. 14, 2001) (emphases added).

analysis, and the court refused to consider other evidence of Cherry's mental retardation. *Id.* at 713-714.

G. Hall's Motion For *Atkins* Relief Is Denied Despite Overwhelming Evidence Of Mental Retardation

In 2004, Hall filed a motion under Florida Rule of Criminal Procedure 3.203, which establishes a process for *Atkins* claims; a hearing was held on the motion in 2009. *See* JA148-380. In light of *Cherry*, at the outset of the hearing the trial court granted the State's motion in limine and required Hall to establish, by clear and convincing evidence, an obtained IQ test score of 70 or below before he could present any evidence regarding his adaptive functioning. JA168.

Hall's evidence. At the hearing, in addition to testimony from his family, Hall presented testimony from, *inter alia*, Dr. Krop, *see supra* n.7, and Dr. Greg Prichard. Dr. Krop, relying on his 1990 evaluation of Hall, as well as Hall's previous evaluations, testified that Hall was "functionally retarded," with a "mental age of around 13." JA243; *see also* JA399. Dr. Krop noted that all of Hall's IQ scores, with the exception of the 80 he received on a test administered by a graduate student, fell "within the range of mental retardation." JA245.[10] Dr. Prichard testified that he had reviewed Hall's prior evaluations and that he had himself evaluated Hall and administered an IQ test, the WAIS-III,

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[10] Another psychologist who evaluated Hall noted that the score of 80 should be viewed skeptically: "The error of measurement [on that test] was and is beyond the expected area of random error and would suggest that there was a specific, non random, reason for the elevation; I would strongly suspect the reason would be ... that a student provided the results and she had ... no supervision on premises." JA424.

on which Hall scored 71. JA324. He explained that "when a person has an I.Q. of between 65 and 75," a clinician must determine whether "those cognitive limitations create deficits in the person's ability to adapt" before determining whether the person has mental retardation. JA326.

In light of the court's ruling on the motion in limine, Hall's counsel proffered Dr. Prichard's testimony that he had assessed Hall's adaptive limitations, in part by interviewing family members. Dr. Prichard concluded that Hall had "significant adaptive deficits" in "virtually every domain measured." JA331. Based on his own assessment and an extensive review of Hall's records and previous testing results, Dr. Prichard concluded that, as a clinical matter, "Hall [met] the three prongs required for a diagnosis of mild mental retardation." JA345.[11]

The State's response. The State made no attempt to rebut Dr. Krop's and Dr. Prichard's diagnoses of mental retardation. Instead, it contended that their diagnoses were irrelevant because *Cherry* had held that an obtained IQ test score of 70 or under was required. As the prosecutor put it: "Dr. Prichard is reciting a clinician's approach to mental retardation, which I submit is not relevant to this proceeding. Because under the law, if an I.Q. is above 70, a person is not men-

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[11] In addition to the tests discussed above, Dr. Prichard considered the results of a WAIS-IV test administered by Dr. Joseph Sesta in 2008, on which Hall scored 72. JA364. Dr. Prichard also considered the results of testing conducted in 2001 by the late Dr. Bill Mosman, in which Hall obtained a score of 69 on the WAIS-III. JA105, JA413, JA449-450. The trial court excluded Dr. Mosman's report from evidence on the ground that, after Dr. Mosman's death, Hall's counsel had been unable to provide the State with the raw data underlying the report. JA106.

tally retarded[.]" JA278-279; *see also, e.g.*, JA327 ("[M]y position is that once the witness testified that his I.Q. test of Mr. Hall revealed a full-scale I.Q. of 71, that the inquiry under Florida law is over."). The court agreed, at one point commenting: "I'm certainly not going to go anywhere near the DSM [the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*]. That's way beyond my field, and I won't even attempt to tell you what that means or says or requires. But legally, I think we all know what the rule and the statute call for." JA341.

The trial court's ruling. The trial court denied Hall's motion. Pointing to Hall's obtained IQ test scores, the court found that Hall was unable to demonstrate "an I.Q. score of 70 or lower." JA107. On that basis, the court concluded that Hall failed to satisfy the "significantly subaverage general intellectual functioning" prong of the mental retardation definition, and that because "all three prongs ... must be met," Hall's "mental retardation claim fail[ed] as a matter of law." JA108, JA109. Despite having granted the State's motion in limine to exclude evidence regarding the remaining two prongs, the court went on to find that Hall could not show deficits in adaptive behavior "existing concurrently" with subaverage intellectual functioning. JA109-111. The court interpreted "concurrently" to mean that Hall had to present evidence of deficits in adaptive behavior that existed at the same time his IQ was tested, which would have required assessing his adaptive functioning in prison. Since Hall failed to present such evidence, the court reasoned that he could not meet the adaptive behavior prong. JA111. The court also found that Hall could not satisfy the third prong—manifestation prior to age 18—because his IQ was not tested before age 18. JA112-113.

The Florida Supreme Court's ruling. On appeal, a divided Florida Supreme Court affirmed. The court reaffirmed its holding in *Cherry* that the "plain language" of the statute requires a "firm IQ cutoff of 70," rejecting Hall's argument that accepted clinical practice requires consideration of the standard error of measurement. JA122, JA123. The court also rejected Hall's argument that the trial court improperly limited his introduction of evidence regarding adaptive functioning, reasoning that "because a defendant must establish all three elements of such a claim, the failure to establish any one element will end the inquiry." JA125. The court accordingly did not address the trial court's conclusions regarding adaptive behavior and onset before age 18.

In a concurring opinion, Justice Pariente found it "[u]nquestionabl[e]" that "clinical definitions of mental retardation recognize the need for application of the SEM and the use of clinical judgment." JA132. But "unless this Court were to recede from *Cherry*," "a plain-language interpretation of Florida's bright-line cutoff score of 70 will remain the rule of law in this state." JA133. Justice Pariente predicted that "[a]t some point in the future, the United States Supreme Court may determine that a bright-line cutoff is unconstitutional because of the risk of executing an individual who is in fact mentally retarded. However, until that time, this Court is not at liberty to deviate from the plain language of section 921.137[(1)]." JA135.

Two Justices dissented. Justice Labarga "wr[ote] to express [his] deep concern with the fact that even though Hall was found to be retarded long before the Supreme Court decided *Atkins*, and even though the evidence was presented below that he remains retarded, we are unable to give effect to the mandate of *At-*

kins under the definition of 'mental retardation' set forth in section 921.137(1)." JA135-136. He observed that Florida's statutory scheme "creates a significant risk that a defendant who has once been found to be mentally retarded may still be executed," in contravention of *Atkins*. JA137. Noting *Atkins*'s directive that States craft "appropriate" procedures to enforce its constitutional holding, Justice Labarga explained that, in his view:

> [T]he imposition of an inflexible bright-line cutoff score of 70 ... is not in every case an appropriate way to enforce the restriction on execution of the mentally retarded.... The Supreme Court barred execution of mentally retarded individuals based in part on the evolving standards of decency in our maturing society, and those standards should include thoughtful consideration of all the factors that mental health professionals consider in determining whether an individual is mentally retarded, without application of an inflexible, oftentimes arbitrary, bright-line cutoff IQ score.

JA140.

Justice Perry also dissented, urging that "[i]f the bar against executing the mentally retarded is to mean anything, Freddie Lee Hall cannot be executed." JA141. Recounting the voluminous evidence of Hall's disability, Justice Perry stated that "Hall is a poster child for mental retardation claims." JA143. "[T]he record here clearly demonstrates that Hall is mentally retarded." *Id.* Yet because Hall obtained IQ test scores above 70, "[t]he current interpretation of the statutory scheme will lead to the execution of a retarded man in this case." JA146. "Hall had been found by

the courts to be mentally retarded before the [Florida] statute was adopted. Once the statute is applied, Hall morphs from someone who has been 'mentally retarded his entire life' to someone who is statutorily barred from attempting to demonstrate ... deficits in adaptive functioning to establish retardation.... [T]his cannot be in the interest of justice." *Id.*

SUMMARY OF ARGUMENT

In 2002, this Court held that the execution of persons with mental retardation violated the Eighth Amendment's prohibition on cruel and unusual punishment, concluding that a national consensus had developed against the practice. *Atkins* v. *Virginia*, 536 U.S. 304, 315-316 (2002). The Court explained that the "diminished capacities" of persons with mental retardation undermined the traditional justifications for the death penalty and increased the likelihood that such persons would be wrongfully executed. *Id.* at 318-321. In describing the contours of that constitutional guarantee, the Court cited two authoritative clinical definitions of mental retardation, *id.* at 308 n.3, 317 n.22, both of which require clinicians to take the standard error of measurement inherent in IQ tests into account in interpreting IQ scores and diagnosing mental retardation.

Although *Atkins* reserved to States the power to "'develop appropriate ways to enforce th[is] constitutional restriction,'" 536 U.S. at 317, nothing in *Atkins* suggests that States have the authority to redefine mental retardation and thus alter the constitutional restriction itself. Permitting that would circumvent the rule announced in *Atkins* and allow the execution of persons who meet the clinical definitions of mental retardation. That conclusion is confirmed by this Court's decisions in *Ford* v. *Wainwright*, 477 U.S. 399 (1986),

and *Panetti* v. *Quarterman*, 551 U.S. 930 (2007). As in *Atkins*, *Ford* announced that a class of persons—those who are insane at the time they are to be executed—may not constitutionally be put to death, leaving it to the States to develop "appropriate" ways to enforce that restriction. 477 U.S. at 416 (plurality opinion). *Ford* itself makes clear, and *Panetti* reaffirmed, that the power to craft appropriate means of enforcing a constitutional protection is not the power to narrow or redefine the constitutional protection itself. States are limited to developing procedures to vindicate such substantive constitutional rights, not to impair them.

Yet Florida's rigid IQ test score cutoff does just that. Rather than enforcing the prohibition on executing persons with mental retardation set out in *Atkins*, the Florida Supreme Court has redefined mental retardation so that it means something different—and narrower—than this Court's decision contemplated. Under Florida's rule, defendants who do not have an obtained IQ test score of 70 or below always fall outside *Atkins*'s protections, regardless of the measurement error inherent in all IQ tests. That is so even if—as here—clinicians have uniformly diagnosed a defendant as having mental retardation. And such defendants are precluded from introducing any evidence—no matter how compelling—of the deficiencies in functioning that render unconstitutional the execution of persons with mental retardation.

The professional clinical organizations whose definitions this Court relied on in *Atkins* agree that Florida's method is not clinically justifiable: In diagnosing mental retardation, clinicians *must* take into account a given IQ test's standard error of measurement. That is necessary because no IQ test is a perfect measure of intellectual ability. The best any test can do, even

when correctly administered, is to provide a certain level of confidence, as a statistical matter, that a person's "true" IQ score—the score he or she would obtain on a hypothetical test with no measurement error—is within a particular range. For most IQ tests, if they are up-to-date and correctly administered and scored, chances are approximately 95% that a person's "true" IQ score is within a range of about ± 5 points from his or her obtained score. Thus, a score of 70 is best interpreted as representing a high likelihood that the person's "true" score is between 65 and 75. For that reason, both leading clinical organizations agree that a person with an obtained IQ test score of up to 75 can be diagnosed with mental retardation if that person displays limitations in adaptive functioning and an onset of disability before age 18.

Florida's insistence on using obtained IQ test scores to determine eligibility for execution, while instructing courts to ignore the measurement error inherent in those scores, thus violates basic statistical and clinical understandings of what IQ scores do and do not mean. And by categorically excluding defendants who would be deemed to have mental retardation as a clinical matter from *Atkins*'s protections, it impermissibly narrows the scope of the constitutional guarantee *Atkins* recognized.

The predictable consequence of Florida's rule is that persons with mental retardation will be executed. Without this Court's intervention, that will happen here. The evidence is overwhelming that Freddie Lee Hall has mental retardation. His teachers classified him as "mentally retarded" 60 years ago, and he has been diagnosed with mental retardation repeatedly over the course of several decades. Indeed, before *Atkins* was decided, the Florida courts agreed that Hall

had been "mentally retarded his entire life," JA46, a finding that while not issue-preclusive after *Atkins*, *see Bobby* v. *Bies*, 556 U.S. 825, 836 (2009), is, to say the least, telling. But Hall is now subject to execution because the Florida Supreme Court has decided that no defendant with an obtained IQ test score over 70 can have mental retardation. That result cannot be squared with the Constitution.

ARGUMENT

I. *ATKINS* MAKES CLEAR THAT THE EIGHTH AMENDMENT FORBIDS EXECUTION OF PERSONS MEETING THE CLINICAL DEFINITION OF MENTAL RETARDATION

A. *Atkins* Relied On The Clinical Definition Of Mental Retardation In Describing The Constitutional Prohibition

1. In *Atkins* v. *Virginia*, 536 U.S. 304, 316 (2002), this Court held that the Eighth Amendment categorically bars imposition of the death penalty on persons with mental retardation and that "a national consensus has developed against it." *See also id.* at 321 (concluding that "such punishment is excessive and that the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender"). Noting that eighteen of the death-penalty States and the federal government had enacted explicit statutory prohibitions against the execution of persons with mental retardation, the Court concluded that "the large number of States prohibiting the execution of mentally retarded persons ... provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal." *Id.* at 315-316. And that "legislative judgment reflects a much broader social and profes-

sional consensus" against imposition of the death penalty on persons with mental retardation. *Id.* at 316 n.21.

In concluding that execution of persons with mental retardation is an unconstitutional sanction, the Court explained that the "characteristics of mental retardation" diminish the personal culpability of defendants with mental retardation, undermine the retribution and deterrence justifications for the death penalty, and raise a "special risk of wrongful execution." *Atkins*, 536 U.S. at 317, 321.

First, the Court recognized that "[m]entally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Atkins*, 536 U.S. at 318. Those "deficiencies do not warrant an exemption from criminal sanctions, but they do diminish the[] personal culpability" of persons with mental retardation. *Id.*; *see also Miller* v. *Alabama*, 132 S. Ct. 2455, 2463 (2012) (citing *Atkins* and explaining that the Court has "adopted categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty"); *Kennedy* v. *Louisiana*, 554 U.S. 407, 420 (2008) (executions of "mentally retarded persons are punishments violative of the Eighth Amendment because the offender had a diminished personal responsibility for the crime").

Second, the Court determined that, given these deficiencies, "there is a serious question as to whether either justification that [this Court] ha[s] recognized as a

basis for the death penalty"—namely, retribution and deterrence—applies to persons with mental retardation. *Atkins*, 536 U.S. at 318-319. "[T]he lesser culpability of the mentally retarded offender" takes away the retributive justification for imposition of the death penalty, which is warranted only for crimes arising from "a consciousness materially more depraved" than that of the "average murderer." *Id.* at 319 (internal quotation marks omitted). Nor would "executing the mentally retarded ... measurably further the goal of deterrence." *Id.* at 320. "[T]he same cognitive and behavioral impairments that make these defendants less morally culpable ... also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information." *Id.*; *see also Roper* v. *Simmons*, 543 U.S. 551, 563 (2005) ("The impairments of mentally retarded offenders make it less defensible to impose the death penalty as retribution for past crimes and less likely that the death penalty will have a real deterrent effect.").

Third, the "lesser ability" of defendants with mental retardation meaningfully to assist their counsel and to control their demeanor in court—as well as the potentially "two-edged" nature of mental retardation, which could increase the likelihood of a finding of future dangerousness—creates a "special risk" that the death penalty will be imposed where it is not justified. *Atkins*, 536 U.S. at 320, 321.

2. In describing mental retardation, the Court relied on the definitions of mental retardation promulgated by the American Association on Mental Retardation (AAMR), now the American Association on Intellectual and Developmental Disabilities (AAIDD), and the American Psychiatric Association (APA). *Atkins*, 536

U.S. at 317 n.22; *see also id.* at 308 n.3 (citing AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* 5 (9th ed. 1992), and APA, *Diagnostic and Statistical Manual of Mental Disorders* 42-43 (4th ed. 2000) ("*DSM-IV*")). These two clinical definitions, which did not differ substantively in any meaningful way, each incorporated three prongs: (1) "'significantly subaverage'" intellectual functioning; (2) limitations in adaptive functioning; and (3) onset before age 18. *Id.* at 308 n.3. The Court explained that while "[t]he statutory definitions of mental retardation" established by the States in banning execution of persons with mental retardation were "not identical," they "generally conform[ed] to the clinical definitions." *Id.* at 317 n.22. Florida's statutory prohibition, for example, was enacted in 2001 and is on its face consistent with the clinical definitions the Court relied on in *Atkins*, *see* Fla. Stat. § 921.137(1) (2012), although the Florida Supreme Court's interpretation of the statute is not, *see infra* Part II.B.

The Court recognized in *Atkins* that neither the AAIDD nor the APA clinical definition set a rigid IQ cutoff of 70 for diagnosing mental retardation. Rather, the Court explained that "[i]t is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." *Atkins*, 536 U.S. at 309 n.5 (citing 2 *Kaplan & Sadock's Comprehensive Textbook of Psychiatry* 2952 (Sadock & Sadock eds., 7th ed. 2000)). Similarly, the Court noted that "'[m]ild' mental retardation is typically used to describe people with an

IQ level of 50-55 to *approximately* 70." *Id.* at 308 n.3 (emphasis added) (citing *DSM-IV* at 42-43).[12]

B. *Atkins* Does Not Permit States To Establish Definitions Of Mental Retardation That Exclude Persons Who Meet The Clinical Definition

In giving content to the constitutional prohibition it described, *Atkins* thus relied on the established clinical definitions of mental retardation. That makes sense, because mental retardation is a clinical condition, and one whose basic parameters have been well-settled for decades, *see infra* Part II.A. Nothing in *Atkins* suggests that States are free to narrow the scope of the constitutional guarantee it set out simply by redefining

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[12] As the Court noted in *Penry* v. *Lynaugh*, 492 U.S. 302, 333 (1989), individuals who are "profoundly or severely retarded" are unlikely to be convicted; thus, "most retarded people who reach the point of sentencing are mildly retarded." *See also* Patton & Keyes, *Death Penalty Issues Following* Atkins, 14 *Exceptionality* 237, 238 (2006) ("[A]lmost all capital cases with an *Atkins* claim involve individuals whose levels of intellectual and adaptive functioning fall in, at, or near the mild range."). As *Atkins* recognized, however, "mild" mental retardation is not a trivial or insignificant disability. *See* 536 U.S. at 309 n.5; *see also, e.g.*, AAIDD, *User's Guide To Accompany the 11th Edition of Intellectual Disability: Definition, Classification, and Systems of Supports* 14 tbl. 3.1 (2012) (identifying characteristics of persons with intellectual disability with higher IQ scores, including "[i]mpaired social judgment ..., lessened interpersonal competence and decision making skills, ... increased vulnerability and victimization," "gullibility ... and/or naiveté or suggestibility," and "difficulties in making sense of the world through ... planning, problem solving, thinking abstractly, comprehending complex ideas, learning quickly, and learning from experience"); JA507 (psychiatrist's testimony that what is referred to as "mild retardation is really not [a] mild" disability).

what it means to have mental retardation, as Florida has done here.

To be sure, *Atkins* observed that "[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." 536 U.S. at 317. And this Court "'le[ft] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction.'" *Id.* (quoting *Ford* v. *Wainwright*, 477 U.S. 399, 405, 416 (1986) (plurality opinion)). *Atkins* thus directs States to develop appropriate *procedures* to determine whether a particular defendant who "claim[s] to be mentally retarded" in fact has mental retardation—that is, to "'enforce the constitutional restriction.'" *Id.* But *Atkins* does not permit States to alter the *substantive* definition of mental retardation and thereby override, rather than enforce, the constitutional restriction. If, for instance, a State defined mental retardation to require an IQ score below 50—a definition which would exclude at least 85% of the population with mental retardation, *see DSM-IV* at 43, no one could doubt that such a definition would not be an "appropriate way[] to enforce" *Atkins*'s constitutional guarantee.

This reading of *Atkins* is confirmed by the Court's decisions in *Ford*, 477 U.S. 399, and *Panetti* v. *Quarterman*, 551 U.S. 930 (2007). In *Ford*, as in *Atkins*, the Court recognized that the Eighth Amendment imposed a substantive prohibition against execution of a particular group: in *Ford*, those who are insane at the time the sentence is to be carried out (as Justice Powell's concurring opinion defined it, "those who are unaware of the punishment they are about to suffer and why they are to suffer it," 477 U.S. at 422 (concurring in part and concurring in judgment)). As in *Atkins* (which cited

Ford for this proposition, *Atkins*, 536 U.S. at 317), the Court in *Ford* "le[ft] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction" on the execution of the insane, 477 U.S. at 416 (plurality opinion). *Ford* made clear, however, that the leeway it was providing to States dealt with "the State's *procedures* for determining sanity." *Id.* (emphasis added). *Ford* nowhere suggests that States may redefine or narrow the constitutional protection at issue. To the contrary, States may develop procedures only to the extent that those procedures do not impair the substantive constitutional right. Indeed, in *Ford* itself, this Court held that Florida's procedure for determining sanity failed adequately to protect the Eighth Amendment right at stake. *Id.* at 417-418 (plurality opinion); *see also id.* at 424 (Powell, J., concurring in part and concurring in judgment).

This Court's decision in *Panetti* reinforces the conclusion that States may not adopt standards that fail adequately to protect a substantive constitutional right against execution. *Panetti* presented a question analogous to that raised here: whether the Fifth Circuit's definition of insanity, which asked only whether a prisoner knew that he was to be executed and knew the State asserted that it was because of the crime he committed—and, if the prisoner did know that, precluded consideration of further evidence of insanity—was consistent with the Eighth Amendment guarantee recognized in *Ford*. 551 U.S. at 956, 958. This Court concluded that it was not: "The principles set forth in *Ford* are put at risk by a rule that deems delusions relevant only with respect to the State's announced reasons for a punishment or the fact of an imminent execution, as opposed to the real interests the State seeks to vindicate." *Id.* at 959 (citation omitted). Thus, although

Ford left it to States to develop appropriate *procedures* to effectuate the Eighth Amendment bar on executing the insane, it did not permit redefining "insanity" in a way that put the principles underlying that bar at risk.

Similarly, here, the Florida Supreme Court has adopted a definition of mental retardation that asks only whether the defendant has scored 70 or below on an IQ test—and, if not, precludes consideration of any other evidence of mental retardation, no matter how compelling—while forbidding the fact-finder to consider the test's inherent measurement error, as accepted clinical practice requires. The question presented is whether that definition adequately implements the constitutional principles set out in *Atkins*. As discussed in more detail below, because Florida's definition of mental retardation excludes persons who meet the clinical definition of the disability recognized in *Atkins*, it exceeds the leeway granted to States to develop appropriate procedures to enforce *Atkins*'s holding and violates the substantive Eighth Amendment guarantee *Atkins* articulated.

II. Florida's IQ Test Score Cutoff Of 70 Is Inconsistent With Accepted Clinical Practice And With The Constitutional Principles Set Out In *Atkins*

The Florida Supreme Court has interpreted the State's statutory prohibition on execution of persons with mental retardation as establishing a fixed IQ test score cutoff of 70. *See Cherry* v. *State*, 959 So. 2d 702, 713 (Fla. 2007) (per curiam). If a defendant's IQ test score is above 70, in the Florida courts' view, he is, by definition, "not mentally retarded." *Id.* at 714. In determining whether an individual satisfies this IQ test score cutoff, the Florida Supreme Court has expressly

refused to take into account the standard error of measurement, even though it is universally accepted clinical practice to do so. *Id.* at 712; *see also* JA124. Accordingly, in Florida, an obtained IQ test score of 71—notwithstanding that it is clinically indistinguishable from a score of 70, in light of the inherent measurement error in the test—bars a defendant from presenting any evidence of limitations in adaptive functioning. That is so no matter how compelling that evidence may be, and no matter how many psychologists may have diagnosed the defendant as having mental retardation in accordance with accepted clinical practice.

Florida's rule is neither clinically nor legally justifiable. Universally accepted clinical practice forbids excluding a diagnosis of mental retardation by reference to an obtained IQ test score alone without regard to measurement error, while precluding consideration of evidence of adaptive limitations. And the certain effect of Florida's rule will be the execution of persons who have mental retardation under the established clinical definition of the condition.

A. The Generally Accepted Clinical Definition Of Mental Retardation Rejects Use Of A Rigid IQ Test Score Cutoff Of 70

1. In *Atkins*, this Court relied on the clinical definition of mental retardation established by the AAMR (now the AAIDD) and the APA. 536 U.S. at 308 n.3. Those clinical definitions "have not changed substantially" in several decades, and the current definitions have the same essential criteria as the definitions the Court relied on in *Atkins*. AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Supports* 6, 7 (11th ed. 2010) ("*AAIDD Manual*"); *see also*

APA, *Diagnostic and Statistical Manual of Mental Disorders* 33 (5th ed. 2013) ("*DSM-5*").

The current AAIDD definition of intellectual disability provides: "Intellectual disability is characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18." *AAIDD Manual* 1. The APA's definition is nearly identical: "Intellectual disability ... is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains." *DSM-5* at 33. Both the AAIDD and the APA provide additional guidelines for the two substantive criteria—intellectual functioning and adaptive behavior—and explain how those criteria should be assessed.

The AAIDD provides that "[t]he 'significant limitations in intellectual functioning' criterion for a diagnosis of intellectual disability is an IQ score that is *approximately* two standard deviations below the mean, *considering the standard error of measurement* for the specific instruments used and the instruments' strengths and limitations." *AAIDD Manual* 31 (emphases added).[13] The current APA definition likewise specifically provides that an IQ score must account for measurement error within a range of ± 5 points: "Individuals with intellectual disability have scores of ap-

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[13] In the past, the AAIDD has defined intellectual functioning in terms of an IQ score rather than a standard deviation from the mean, but in doing so it has recognized that the criterion is satisfied at a score of "approximately 70 to 75 or below" (1992) or noted that the "upper limit [of 70] is intended as a guideline and could be extended to 75 or more" (1983). *AAIDD Manual* 10.

proximately two standard deviations or more below the population mean, including a margin for measurement error (generally +5 points). On tests with a standard deviation of 15 and a mean of 100, this involves a score of 65-75 (70 ± 5)." *DSM-5* at 37.

2. The clinical definitions of the intellectual functioning prong thus make clear that obtained IQ test scores are approximations and that the diagnostic criteria for mental retardation must take into account the standard error of measurement. There is good reason for this, inherent in the nature of IQ tests: Measuring a person's intellectual functioning presents distinct challenges given the nature of intelligence and questions about whether it can be reduced effectively to a single score. *See generally* Mackintosh, *IQ and Human Intelligence* 3 (2d ed. 2011) (surveying different definitions of intelligence); *AAIDD Manual* 32-34. Thus, although "intellectual functioning is currently best represented by IQ scores when they are obtained from appropriate, standardized and individually administered assessment instruments," such scores are "far from perfect." *AAIDD Manual* 31.

Modern IQ tests do not purport to measure intelligence as an absolute matter. *See* Kaufman, *IQ Testing 101* at 125 (2009). Rather, they measure only *relative* intelligence as compared to one's peers. *See* Mackintosh 33-34. Thus, when individual editions of IQ tests are developed, they are administered to a large group of people, carefully chosen to be representative of the population. *See* Kaufman 125-127; *see also* Psychological Corp., *WAIS-III/WMS-III Technical Manual* 19-35 (1997). And tests must periodically be renormed in order to ensure that they continue to reflect the performance of a representative group. *WAIS-III Technical Manual* 8-9. The performance of the group defines the

mean score for the test; individual IQ scores simply represent how far a person's IQ deviates from that mean (for that reason, they are sometimes referred to as "deviation" scores). *See* Mackintosh 33.

IQ tests are designed so that the mean score is 100—an arbitrary number chosen for convenience. *See* Kaufman 107. Again, the average performance of the group against which the test is normed defines what is necessary to score 100. IQ scores have an approximately normal distribution; that is, if the scores of a representative group of the population are graphed, the result will be the familiar bell-shaped curve, showing that people most commonly score near the mean of 100 and that scores become increasingly less common the farther they are from the mean. *See id.* 108.

The distance of a particular person's score from the mean is sometimes expressed in terms of standard deviations. Typically, as with Wechsler tests, the standard deviation from the mean is 15. Kaufman 107. Because IQ scores are approximately normally distributed, about two-thirds of all people score within one standard deviation of the mean, or between 85 and 115. *Id.* 108. Over 95% of all people score within two standard deviations of the mean, or between 70 and 130. *Id.* Only about 2.3% of people score more than two standard deviations below the mean. *Id.* As noted above, *see supra* pp. 35-36, both the AAIDD and the APA definitions of intellectual disability use performance two standard deviations below the mean as a rough proxy for significantly subaverage intellectual functioning. *AAIDD Manual* 31; *DSM-5* at 37.

Both organizations, however, recognize that whether an individual has significant limitations in intellectual functioning "cannot be viewed as only a sta-

tistical calculation." *AAIDD Manual* 35. As the AAIDD makes clear:

> The intent of this definition *is not to specify a hard and fast cutoff point/score* for meeting the significant limitations in intellectual functioning criterion .... Rather, one needs to use clinical judgment in interpreting the obtained score in reference to the test's standard error of measurement, the assessment instrument's strengths and limitations, and other factors such as practice effects, fatigue effects, and age of norms used[.]

Id. (emphasis added); *see also DSM-5* at 37 ("Clinical training and judgment are required to interpret test results and assess intellectual performance.").

The developers of IQ tests also recognize the critical role of clinical judgment in interpreting scores, calling clinicians "themselves ... the cornerstone of any assessment." *WAIS-III Technical Manual* 3; *see also* Psychological Corp., *WAIS-IV Technical and Interpretive Manual* 3 (2008). And the *WAIS-III Technical Manual* instructs clinicians to "view each examinee as unique and take into account nonintellective factors and other life-history information when interpreting the test results." *WAIS-III Technical Manual* 2.

3. Clinical judgment in interpreting obtained IQ test scores is critical because no IQ test is a perfect measure of a person's intelligence or even of his or her "true" IQ test score.[14] A particular obtained IQ test

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[14] "True" IQ score is a statistical concept. A person's "true" score is simply the "hypothetical" score he or she would receive on a particular IQ test "if the test were perfectly reliable." *WAIS-IV Technical Manual* 41.

score may overstate or understate a person's true score for several reasons. *See WAIS-IV Technical Manual* 41. One reason is simply the influence of chance: A person may guess or fail to guess the correct answer to a particular item. Kaufman 138. A person's performance is also likely to fluctuate due to personal circumstances that do not bear on intelligence, such as whether he or she was in good health when the test was administered. *See* AAIDD, *User's Guide To Accompany the 11th Edition of Intellectual Disability: Definition, Classification, and Systems of Supports* 22 (2012). Testing conditions, including the environment or location of the test, may also affect a person's score. *Id.* So may an examiner's demeanor. Kaufman 139. In addition, while IQ test scoring is as objective as possible, there are situations in which examiners must use judgment in order to score a particular response. *Id.* 138-139.[15]

To account for the variability introduced by these known issues, each IQ test has its own standard error of measurement, which is calculated by the test designers. *AAIDD Manual* 36. The SEM is used to determine a confidence interval surrounding an obtained score and to estimate the probability that a person's true IQ test score falls within a certain range. *See* Aiken, *Assessment of Intellectual Functioning* 42 (2d ed. 1996); Kaufman 141-143; *WAIS-IV-Technical Manual* 46; *WAIS-III Technical Manual* 53. Those intervals "express test score precision and serve as reminders that measurement error is inherent in all test scores

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[15] For instance, Wechsler tests ask people to define certain words and provide examples of 2-point, 1-point, and no-point responses, but an examiner must use his or her judgment to score a response that is not among the listed examples. Kaufman 138-139.

and that observed test scores are only estimates of true ability." *WAIS-IV Technical Manual* 46.

Generally, an obtained score plus or minus approximately one SEM yields a confidence interval equating to a 66% probability that a person's true IQ test score falls within that range. *AAIDD Manual* 36. So, for example, if a person scores 70 on an IQ test with an SEM of 2.5 points, the person's score can be more accurately expressed as falling within a band, or confidence interval, of 67.5 to 72.5, representing an approximately two-thirds chance that the person's true score is within that range. To obtain greater confidence that the true score falls within the range, the range must be expanded. Typically, an obtained score plus or minus approximately two SEMs will yield a 95% confidence interval. *Id.* Thus, in the example above, the chances are approximately 95% that the person's true score is within two SEMs of 70, or 65 to 75.[16] In Hall's case, for example, his most recent IQ test score, a 72 on the WAIS-IV, is more appropriately expressed in terms of a 95% probability that his true score lies between 68 and 76.[17]

To assess intellectual functioning accurately, a clinician *must* take account of the SEM and resulting con-

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[16] These numbers are illustrative only. Confidence intervals for specific scores must be derived from the SEM associated with the particular testing instrument. *See WAIS-IV Technical Manual* 46.

[17] This number is derived from the WAIS-IV's average Full-Scale SEM of 2.16. *See WAIS-IV Technical Manual* 45. The WAIS-IV also allows practitioners to calculate a confidence interval using a slightly different method, which results in a 95% confidence interval of 68 to 77 for an obtained score of 72. *See id.* 46; Psychological Corp., *WAIS-IV Administration and Scoring Manual* 224 tbl. A.7 (2008).

fidence intervals. Both the AAIDD and the APA "support the best practice" of reporting IQ test scores with their associated confidence intervals based on the SEM. *AAIDD Manual* 36; *see DSM-5* at 37. And both professional organizations stress that such reporting is a "critical consideration" in the "appropriate use of intelligence tests" that "must be part of any decision concerning the diagnosis of ID [intellectual disability]." *AAIDD Manual* 36; *see DSM-5* at 37; *see also* Bonnie & Gustafson, *The Challenge of Implementing* Atkins v. Virginia: *How Legislatures and Courts Can Promote Accurate Assessments and Adjudications of Mental Retardation in Death Penalty Cases*, 41 U. Rich. L. Rev. 811, 835 (2007); *WAIS-IV Technical Manual* 41 ("The reliability of a test should always be considered when interpreting obtained test scores and differences between an individual's test scores on multiple occasions.").[18]

4. Using an IQ test score cutoff of 70 that does not permit consideration of the SEM will inevitably exclude from *Atkins*'s protections persons who truly have men-

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[18] The SEM is an inherent feature of all IQ tests, including tests that were recently normed against a representative population and correctly administered. Other factors can also affect the reliability of IQ scores. *See generally AAIDD Manual* 37-41 (describing several such factors). For example, some testing instruments are more reliable than others. *DSM-5* at 37 ("Invalid scores may result from the use of brief intelligence screening tests or group tests[.]"); *AAIDD Manual* 41; *see supra* n.5. In addition, "scoring errors on IQ tests are common, even among experienced examiners." Macvaugh & Cunningham, Atkins v. Virginia: *Implications and Recommendations for Forensic Practice*, 37 J. Psychiatry & L. 131, 156 (2009); *see also* Kaufman & Lichtenberger, *Assessing Adolescent and Adult Intelligence* 198 (3d ed. 2006) (noting that in one study "the ranges of the [obtained] IQs were huge, reflecting an abominable number of scoring errors").

tal retardation. As the AAIDD explains, "AAIDD ... *does not* intend for a fixed cutoff point to be established for making the diagnosis" because "[a] fixed point cut-off score is not psychometrically justifiable." *AAIDD Manual* 40 (emphasis in original). The APA has similarly concluded that use of "a specific cut-off score is inappropriate, not only because different tests have different scoring norms, but also because designating a specific score ignores the standard error of measurement and attributes greater precision to these measures than they can support." Bonnie, *The American Psychiatric Association's Resource Document on Mental Retardation and Capital Sentencing: Implementing* Atkins v. Virginia, 28 Mental & Physical Disability L. Rep. 11, 11 (2004); *see also DSM-5* at 37.

That does not mean that a properly administered, valid IQ test can *never* rule out mental retardation. But, in light of the measurement error in all IQ tests, if a person's obtained IQ test score on such a test is 75 or below, accepted clinical practice requires examining the person's adaptive functioning before ruling out a diagnosis of mental retardation. *See, e.g.*, Macvaugh & Cunningham, Atkins v. Virginia: *Implications and Recommendations for Forensic Practice*, 37 J. Psychiatry & L. 131, 147 (2009) (noting that because of the SEM, it is "possible to diagnose mental retardation based on an IQ score of 75 or below, as long as there is evidence of related deficits in adaptive behavior"); *DSM-5* at 37; *AAIDD Manual* 35-36; Aiken 277. As the AAIDD and APA both recognize, a fixed IQ test score cutoff of 70 prematurely ends the clinical inquiry and improperly excludes persons whose deficits in intellectual and adaptive functioning would qualify them for a diagnosis of mental retardation.

B. Florida's Rule Is Inconsistent With Clinical Practice, Places It In The Minority Of Jurisdictions, And Creates An Unacceptable Risk That Persons With Mental Retardation Will Be Executed

1. Florida's statute barring execution of persons with mental retardation could be interpreted consistently with the accepted clinical practice described above. The statute defines mental retardation (now "intellectual disability") as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18." Fla. Stat. § 921.137(1). "'[S]ignificantly subaverage general intellectual functioning[]' ... means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the [Florida] Agency for Persons with Disabilities." *Id.* And the legislative staff analysis accompanying the law stated that "[t]he bill does not contain a set IQ level .... Two standard deviations from these tests is approximately a 70 IQ, although it can be extended up to 75." Fla. S. Staff Analysis, CS/SB 238, at 11 (Feb. 14, 2001).

The Florida Supreme Court, however, has interpreted the statute to require "a firm cutoff of 70 or below to qualify as mentally retarded," and to forbid consideration of the SEM, even though considering the SEM is necessary to an accurate determination of whether a person's IQ is in fact two standard deviations below the mean. JA119, JA121-123; *see also, e.g.*, *Cherry*, 959 So. 2d at 712-713. In other words, if a person's obtained IQ test score is 71 or above, Florida's interpretation of the statute mandates the legal conclusion that the individual is not a person with mental retardation, regardless of any clinical diagnosis or other evi-

dence establishing mental retardation. *See Cherry*, 959 So. 2d at 714 (because "Cherry's IQ score of 72 does not fall within the statutory range[,] ... Cherry is not mentally retarded," and "we do not consider the two other prongs of the mental retardation determination").

In *Cherry*, the Florida Supreme Court acknowledged that its interpretation of the statute was inconsistent with accepted clinical practice for diagnosing mental retardation, quoting the trial court's comment that "'the +/–5 standard of error is a universally accepted given fact and, as such, should logically be considered, among other evidence, in regard to the factual finding of whether an individual is mentally retarded.'" 959 So. 2d at 712. But the Florida Supreme Court accepted the trial court's reasoning that "the statute does not use the word approximate, nor does it reference the SEM." *Id.* at 713. Since then, the Florida Supreme Court has consistently reaffirmed its position that the "plain language" of the Florida statute requires a strict IQ test score cutoff of 70. JA124 (collecting cases); *see also, e.g.*, *Franqui* v. *State*, 59 So. 3d 82, 94 (Fla. 2011) (per curiam); *Nixon* v. *State*, 2 So. 3d 137, 142-143 (Fla. 2009) (per curiam); *Jones* v. *State*, 966 So. 2d 319, 329 (Fla. 2007) (per curiam).

2. Other death-penalty jurisdictions have rejected a rigid IQ test score cutoff of 70 as inconsistent with the clinical definition of mental retardation, either through express legislative enactments requiring consideration of the SEM or through judicial decision. *See, e.g.*, Okla. Stat. tit. 21, § 701.10b(C) ("In determining the intelligence quotient, the standard measurement of error for the test administ[er]ed shall be taken into account."); *Ex parte Briseno*, 135 S.W.3d 1, 7 n.24 (Tex. Crim. App. 2004) ("Psychologists and other mental health professionals are flexible in their assessment of mental retar-

dation; thus, sometimes a person whose IQ has tested above 70 may be diagnosed as mentally retarded while a person whose IQ tests below 70 may not be mentally retarded." (citing AAMD, *Classification in Mental Retardation* 23 (Grossman ed., 1983))); *Pruitt* v. *State*, 834 N.E.2d 90, 106 (Ind. 2005) ("IQ tests are ... not conclusive on either the subject's IQ or the ultimate question of mental retardation."); *State* v. *Dunn*, 41 So. 3d 454, 470 (La. 2010) ("I.Q. scores are not exact and represent a range, generally considered to be five points in either direction, in which the actual score falls.").[19]

Several States, no doubt recognizing the statistical limitations of IQ measurements, regard test scores only

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[19] *See also* Ariz. Rev. Stat. Ann. § 13-753(K)(5) ("The court in determining the intelligence quotient shall take into account the margin of error for the test administered."); *State* v. *Maestas*, 299 P.3d 892, 948 (Utah 2012) ("IQ scores are just one factor to be considered" and "courts should carefully consider other relevant evidence," "particularly ... when the defendant's IQ score falls in the range spanning the cusp of clinical mental retardation"); *Ybarra* v. *State*, 247 P.3d 269, 274 (Nev. 2011) (en banc) (some "'individuals with IQs between 70 and 75' fall into the category of subaverage intellectual functioning" "[b]ecause 'there is a measurement error of approximately 5 points in assessing IQ'"); *In re Hawthorne*, 105 P.3d 552, 557 (Cal. 2005) ("a fixed cutoff is inconsistent with established clinical definitions" and "IQ test scores are insufficiently precise to utilize a fixed cutoff in this context"); *Commonwealth* v. *Miller*, 888 A.2d 624, 631 (Pa. 2005) ("[W]e do not adopt a cutoff IQ score."); *Stripling* v. *State*, 401 S.E.2d 500, 504 (Ga. 1991) ("At best, an IQ score is only accurate within a range of several points, and for a variety of reasons, a particular score may be less accurate."); *see also United States* v. *Davis*, 611 F. Supp. 2d 472, 475 (D. Md. 2009) ("A 'significant' limitation in intellectual functioning is best represented by an IQ score that is approximately two standard deviations below the mean as measured by appropriate instruments, and in consideration of the standard error of measurement (SEM)."). The relevant state statutes and judicial interpretations are set forth in Appendix B (11a-52a).

as establishing a presumption of retardation (or lack thereof) that can be rebutted in an individual case upon consideration of other clinical factors. *E.g.*, Neb. Rev. Stat. § 28-105.01(3) (IQ score of "seventy or below ... shall be presumptive evidence of intellectual disability"); Ark. Code Ann. § 5-4-618(a)(2) ("There is a rebuttable presumption of mental retardation when a defendant has an intelligence quotient of sixty-five (65) or below.").

Florida is in a small minority of States that appear to have adopted a rigid IQ test score cutoff of 70 or to have suggested that courts may apply such a cutoff without consideration of the SEM. *See Smith* v. *State*, 71 So. 3d 12, 20 (Ala. Crim. App. 2008); *Bowling* v. *Commonwealth*, 163 S.W.3d 361, 375 (Ky. 2005); *Johnson* v. *Commonwealth*, 591 S.E.2d 47, 59 (Va. 2004), *vacated and remanded on other grounds*, 544 U.S. 901 (2005); *cf. Pizzuto* v. *State*, 202 P.3d 642, 651 (Idaho 2008) (stating that the legislature "required that [IQ] be 70 or below" but permitting courts to draw "reasonable inferences" regarding SEM).[20]

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[20] Courts in a number of States have not yet construed their statutory definitions of subaverage intellectual functioning or determined whether state law permits consideration of the SEM and the exercise of clinical judgment in interpreting borderline scores in the death-penalty context. *See, e.g.*, Conn. Gen. Stat. § 1-1g(c) ("more than two standard deviations below the mean") (repealing death penalty for new offenses, An Act Revising the Penalty for Capital Felonies, Conn. Pub. Act No. 12-5, §§ 2-3 (Apr. 25, 2012)); Del. Code Ann. tit. 11, § 4209(d)(3)(d)(3) ("70 or below"); Kan. Stat. Ann. § 76-12b01(i) ("two or more standard deviations from the mean"); N.C. Gen. Stat. § 15A-2005(a)(1)(c) ("70 or below"); Wash. Rev. Code § 10.95.030(2)(c) ("seventy or below"). Some of these States do not commonly employ capital punishment or have abolished it for new offenses (or altogether) and thus will have little or no opportunity to construe the statutory definitions at issue. *Cf.*

Indeed, Florida's definition of mental retardation for purposes of imposing the death penalty is inconsistent with its own recognition in other contexts that a strict IQ test score cutoff is inconsistent with accepted clinical practice. In defining eligibility for vocational rehabilitation services, Florida regulations explain that "[t]he DSM defines the upper range of intellectual disability (also referred to as mental retardation) as an IQ of 70 plus or minus five (5). This means that an individual may be diagnosed as mildly intellectually disabled with an IQ as high as 75 if there are significant adaptive functioning deficits." Fla. Admin. Code Ann. r. 6A-25.005(10)(b); *see also id.* 65G-4.017(3)(a) (defining eligibility for behavioral services without reference to an IQ test score cutoff and cautioning that "[a] single test or subtest should not be used alone to determine eligibility"); JA191 (Dr. Valerie McClain testifying that, for purposes of developmental services eligibility, a clinician has discretion to diagnose a person scoring in the low-to-mid 70s with mental retardation).

3. The procedure followed in Florida and the few other States that set a rigid IQ test score cutoff of 70 in capital cases presents an unacceptable risk that persons with mental retardation will be put to death. Approximately 2.3% of the population has an IQ of 70 or below. Simply by virtue of the shape of the bell curve, more than half of those people—and an even larger proportion of capital defendants with mental retardation, *see supra* n.12—will fall into the 65 to 70 range.[21] For per-

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Atkins, 536 U.S. at 316 (observing that States with few executions have "little need to pursue legislation barring the execution of the mentally retarded" and thus their silence should not be interpreted as condoning the practice).

[21] With a normally distributed population, 1.29 percent of the population will obtain an IQ test score between 65 and 70. These

sons in that group, there is a substantial risk that the measurement errors described above will yield an obtained IQ test score above 70 notwithstanding that the person's "true" score would place him or her two standard deviations below the mean, *i.e.*, in the accepted range for mental retardation.

Focusing solely on an obtained IQ test score in isolation has negative consequences apart from failing accurately to predict a person's "true" IQ score. Mental retardation is not merely equivalent to a low IQ score. Rather, under both the AAIDD's and the APA's definitions, a person must demonstrate that his or her intellectual deficits are accompanied by substantial limitations in adaptive functioning, which "refer[s] to how well a person meets community standards of personal independence and social responsibility." *DSM-5* at 37; *see also AAIDD Manual* 43 ("Adaptive behavior is the collection of conceptual, social, and practical skills that have been learned and are performed by people in their everyday lives."). In some ways, limitations in adaptive functioning may be the more significant component of mental retardation. As the APA explains:

> IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks. For example, a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other are-

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numbers are derived from a standard normal distribution table, which is widely available. *See, e.g.*, *Standard Normal Distribution*, http://www.stat.tamu.edu/~lzhou/stat302/standardnormaltable.pdf (last visited Dec. 16, 2013).

> as of adaptive functioning that the person's actual functioning is comparable to that of individuals with a lower IQ score.

DSM-5 at 37. The level of support people with mental retardation require is thus determined by their level of adaptive functioning and not their IQ scores. *Id.* 33; *see also* APA, *DSM-5 Intellectual Disability Fact Sheet* 1-2, http://www.dsm5.org/Documents/Intellectual%20Disability%20Fact%20Sheet.pdf (last visited Dec. 16, 2013) (noting that IQ test scores should not be "overemphasized as the defining factor of a person's overall ability, without adequately considering functioning levels. This is especially important in forensic cases[.]").

This Court recognized in *Atkins* that persons with mental retardation have lesser culpability, and may not constitutionally be put to death, because of their "diminished capacities ... to communicate, to abstract from mistakes and learn from experience, ... to control impulses, and to understand the reactions of others." 536 U.S. at 318. Yet, under Florida's rule, a person without an obtained IQ test score of 70 or below is precluded from presenting evidence of such diminished capacities, no matter how severe they may be, and notwithstanding a clinical diagnosis of mental retardation. That is consistent neither with accepted clinical practice nor with the Constitution.

III. There Is No Genuine Dispute That Under Accepted Clinical Standards, Hall Has Mental Retardation

The facts of this case make plain what is at stake. There is no genuine dispute that, when assessed according to accepted clinical standards, Hall has mental retardation. If he and others who are similarly disabled can nonetheless be executed based on a rigid IQ test

score cutoff that ignores the standard error of measurement inherent in IQ test scores, the constitutional guarantee recognized in *Atkins* will be significantly impaired.

As the Florida courts recognized, "Hall has been mentally retarded his entire life." JA46. He could not learn in school; he could not speak in a way others could understand; he could not read or write; he had few friends among his peers; and he bore an outsize share of the brutal torture directed at the children by their mother both because he could not accomplish the tasks she set and because he could not articulate any defense. After he was grown, Hall could not adequately perform even unskilled labor, he could not manage money, and he could not cook or clean for himself. Into his adulthood, Hall retained the limited understanding and the coping skills of a young child.

Hall's teachers easily recognized his disability, classifying him as "mentally retarded" no fewer than four times during his elementary school years. JA528. And virtually every psychologist or psychiatrist who conducted intelligence testing on Hall has diagnosed him as having mental retardation, beginning long before this Court's decision in *Atkins*. That is not surprising: All but one of Hall's IQ test scores on the "gold standard" testing instruments—the Wechsler tests—are consistent in clustering in the high 60s to low 70s: 69 on the WAIS-III, 71 on the WAIS-III, 72 on the WAIS-IV, 73 on the WAIS-R, and 74 on the WAIS-R. JA 85, JA104-105, JA108.[22] All of those scores are with-

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[22] The one outlier, a score of 80 on the WAIS-R, is discussed above, *see supra* pp. 12 & 18 n.10.

in the 95% confidence interval for a "true" score of 70, or two standard deviations below the mean.

Those scores alone, of course, are insufficient to yield a diagnosis of mental retardation. But they would prompt any competent clinician, following the guidelines established by the AAIDD and APA, to investigate adaptive behavior. And the many clinicians who diagnosed Hall as having mental retardation did so based on ample evidence of his profound adaptive deficits—the very same adaptive deficits that this Court held in *Atkins* render execution a disproportionate punishment for persons with mental retardation, *see* 536 U.S. at 318, but that Florida barred Hall from establishing. This Court should reverse Florida's unscientific—and unconstitutional—rule and direct the Florida courts to consider that evidence:

- "Hall's functioning is, by and large, at the first grade level.... [He] is severely learning disabled." JA384 (Dr. Lewis).
- "Mr. Hall is an illiterate adult. His mathematical abilities are virtually non-existent. He is probably incapable of even the most basic living skills which incorporate math and reading ... His speech is often incomprehensible and his use and understanding of language [are] no better than a nine year old[]." JA383 (Dr. Bard).
- "[Hall's] behavior [is] symptomatic of serious mental deficits. His history is characterized by poor social achievement, poor socialization and a poor environment incapable of providing sufficient nurturing. He is unable to reason abstractly ... or to project consequences and [he is] easily influenced." JA392 (Dr. Toomer).

- "Mr. Hall ... has difficulties in receptive and expressive language but he has even more serious and severe difficulties in written language.... [He] has severe deficits in both Community and Domestic areas of functioning ... [and] across the board deficits in Interpersonal Relationships, Coping Skills, and Time Structuring. [His adaptive functioning score] is over 3 standard deviations lower than what would be expected ... in a non-retarded individual." JA417 (Dr. Mosman). "Mr. Hall will continue to function [at the level] of a child who is not even a teenager." JA430.

- "[T]here is a plethora of evidence that Mr. Hall [is] mentally retarded .... He was slow reaching developmental milestones, could not learn to read or write, was gullible and easily led, communicated poorly, was considered mentally retarded throughout school, failed a military exam because of cognitive difficulties, was considered inadequate and cognitively inferior in [the Department of Corrections], could not obtain a driver's license, demonstrated gross deficits in adaptive skills, and consistently has been characterized as brain damaged, dull, and retarded by the vast majority of professionals who have evaluated him." JA454 (Dr. Prichard).

In short, if left uncorrected, the Florida Supreme Court's ruling will permit the execution of a person who clinicians have recognized (JA455) "is mentally retarded, has always been mentally retarded, and will be mentally retarded for the remainder of his life."

CONCLUSION

The judgment of the Supreme Court of Florida should be reversed.

Respectfully submitted.

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APPENDIX

APPENDIX A

STATUTES AND RULES

Fla. Stat. § 921.137 (2012)—Imposition of the Death Sentence upon a Defendant with Mental Retardation Prohibited

(1) As used in this section, the term "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities. The term "adaptive behavior," for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community. The Agency for Persons with Disabilities shall adopt rules to specify the standardized intelligence tests as provided in this subsection.

(2) A sentence of death may not be imposed upon a defendant convicted of a capital felony if it is determined in accordance with this section that the defendant has mental retardation.

(3) A defendant charged with a capital felony who intends to raise mental retardation as a bar to the death sentence must give notice of such intention in accordance with the rules of court governing

notices of intent to offer expert testimony regarding mental health mitigation during the penalty phase of a capital trial.

(4) After a defendant who has given notice of his or her intention to raise mental retardation as a bar to the death sentence is convicted of a capital felony and an advisory jury has returned a recommended sentence of death, the defendant may file a motion to determine whether the defendant has mental retardation. Upon receipt of the motion, the court shall appoint two experts in the field of mental retardation who shall evaluate the defendant and report their findings to the court and all interested parties prior to the final sentencing hearing. Notwithstanding s. 921.141 or s. 921.142, the final sentencing hearing shall be held without a jury. At the final sentencing hearing, the court shall consider the findings of the court-appointed experts and consider the findings of any other expert which is offered by the state or the defense on the issue of whether the defendant has mental retardation. If the court finds, by clear and convincing evidence, that the defendant has mental retardation as defined in subsection (1), the court may not impose a sentence of death and shall enter a written order that sets forth with specificity the findings in support of the determination.

(5) If a defendant waives his or her right to a recommended sentence by an advisory jury following a plea of guilt or nolo contendere to a capital felony and adjudication of guilt by the court, or following a jury finding of guilt of a capital felony, upon acceptance of the waiver by the court, a defendant who has given notice as required in subsection (3) may file a motion for a determination of mental

retardation. Upon granting the motion, the court shall proceed as provided in subsection (4).

(6) If, following a recommendation by an advisory jury that the defendant be sentenced to life imprisonment, the state intends to request the court to order that the defendant be sentenced to death, the state must inform the defendant of such request if the defendant has notified the court of his or her intent to raise mental retardation as a bar to the death sentence. After receipt of the notice from the state, the defendant may file a motion requesting a determination by the court of whether the defendant has mental retardation. Upon granting the motion, the court shall proceed as provided in subsection (4).

(7) The state may appeal, pursuant to s. 924.07, a determination of mental retardation made under subsection (4).

(8) This section does not apply to a defendant who was sentenced to death prior to the effective date of this act.

Fla. R. Crim. P. 3.203 (2004)—Defendant's Mental Retardation As a Bar to Imposition of the Death Penalty*

(a) **Scope.** This rule applies in all first-degree murder cases in which the state attorney has not waived the death penalty on the record and the defendant's mental retardation becomes an issue.

(b) **Definition of Mental Retardation.** As used in this rule, the term "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this rule, means performance that is two or more standard deviations from the mean score on a standardized intelligence test authorized by the Department of Children and Family Services in rule 65B–4.032 of the Florida Administrative Code. The term "adaptive behavior," for the purpose of this rule, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community.

(c) **Motion for Determination of Mental Retardation as a Bar to Execution: Contents; Procedures.**

(1) A defendant who intends to raise mental retardation as a bar to execution shall file a written

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* In 2009, Rule 3.203 was "amended to correct technical issues." *In re Amendments to Fla. R. Crim. P.*, 26 So. 3d 534, 536 (Fla. 2009); *see also Amendments to Fla. R. Crim. P. & Fla. R. App. P.*, 875 So. 2d 563, 569-572 (Fla. 2004) (adopting original version).

motion to establish mental retardation as a bar to execution with the court.

(2) The motion shall state that the defendant is mentally retarded and, if the defendant has been tested, evaluated, or examined by one or more experts, the names and addresses of the experts. Copies of reports containing the opinions of any experts named in the motion shall be attached to the motion. The court shall appoint an expert chosen by the state attorney if the state attorney so requests. The expert shall promptly test, evaluate, or examine the defendant and shall submit a written report of any findings to the parties and the court.

(3) If the defendant has not been tested, evaluated, or examined by one or more experts, the motion shall state that fact and the court shall appoint two experts who shall promptly test, evaluate, or examine the defendant and shall submit a written report of any findings to the parties and the court.

(4) Attorneys for the state and defendant may be present at the examinations conducted by court-appointed experts.

(5) If the defendant refuses to be examined or fully cooperate with the court appointed experts or the state's expert, the court may, in the court's discretion:

(A) order the defense to allow the court-appointed experts to review all mental health reports, tests, and evaluations by the defendant's expert;

(B) prohibit the defense experts from testifying concerning any tests, evaluations, or examinations of the defendant regarding the defendant's mental retardation; or

(C) order such relief as the court determines to be appropriate.

(d) Time for filing Motion for Determination of Mental Retardation as a Bar to Execution.

(1) *Cases in which trial has not commenced.* In all cases in which trial has not commenced on October 1, 2004, the motion for a determination of mental retardation as a bar to execution shall be filed not later than 90 days prior to trial, or if the trial is set earlier than 90 days from October 1, 2004, at such time as is ordered by the court.

(2) *Cases in which trial has commenced on October 1, 2004.* In all cases in which trial has commenced on October 1, 2004, the motion shall be filed and determined before a sentence is imposed.

(3) *Cases in which a direct appeal is pending.* If an appeal of a circuit court order imposing a judgment of conviction and sentence of death is pending on October 1, 2004, the defendant may file a motion to relinquish jurisdiction for a mental retardation determination within 60 days of October 1, 2004. The motion shall contain a copy of the motion to establish mental retardation as a bar to execution and shall contain a certificate by appellate counsel that the motion is made in good faith and on reasonable

grounds to believe that the defendant is mentally retarded.

(4) *Cases in which the direct appeal is final; contents of motion; conformity with Florida Rule of Criminal Procedure 3.851.*

(A) A motion for postconviction relief seeking a determination of mental retardation made by counsel for the prisoner shall contain a certification by counsel that the motion is made in good faith and on reasonable grounds to believe that the prisoner is mentally retarded.

(B) If a death sentenced prisoner has not filed a motion for postconviction relief on or before October 1, 2004, the prisoner shall raise a claim under this rule in an initial rule 3.851 motion for postconviction relief.

(C) If a death sentenced prisoner has filed a motion for postconviction relief and that motion has not been ruled on by the circuit court on or before October 1, 2004, the prisoner may amend the motion to include a claim under this rule within 60 days after October 1, 2004.

(D) If a death-sentenced prisoner has filed a motion for postconviction relief and that motion has been ruled on by the circuit court but the prisoner has not filed an appeal on or before October 1, 2004, the prisoner shall file a supplemental motion in the circuit court raising the mental retardation claim. The prisoner's time for filing an appeal of the ruled-upon postconviction mo-

tion is stayed until the circuit court rules upon the mental retardation claim.

(E) If a death sentenced prisoner has filed a motion for postconviction relief and that motion has been ruled on by the circuit court and an appeal is pending on or before October 1, 2004, the prisoner may file a motion in the supreme court to relinquish jurisdiction to the circuit court for a determination of mental retardation within 60 days from October 1, 2004. The motion to relinquish jurisdiction shall contain a copy of the motion to establish mental retardation as a bar to execution, which shall be raised as a successive rule 3.851 motion, and shall contain a certificate by appellate counsel that the motion is made in good faith and on reasonable grounds to believe that the defendant is mentally retarded.

(F) If a death sentenced prisoner has filed a motion for postconviction relief, the motion has been ruled on by the circuit court, and that ruling is final on or before October 1, 2004, the prisoner may raise a claim under this rule in a successive rule 3.851 motion filed within 60 days after October 1, 2004. The circuit court may reduce this time period and expedite the proceedings if the circuit court determines that such action is necessary.

(e) Hearing on Motion to Determine Mental Retardation. The circuit court shall conduct an evidentiary hearing on the motion for a determination of mental retardation. At the hearing, the court shall

consider the findings of the experts and all other evidence on the issue of whether the defendant is mentally retarded. The court shall enter a written order prohibiting the imposition of the death penalty and setting forth the court's specific findings in support of the court's determination if the court finds that the defendant is mentally retarded as defined in subdivision (b) of this rule. The court shall stay the proceedings for 30 days from the date of rendition of the order prohibiting the death penalty or, if a motion for rehearing is filed, for 30 days following the rendition of the order denying rehearing, to allow the state the opportunity to appeal the order. If the court determines that the defendant has not established mental retardation, the court shall enter a written order setting forth the court's specific findings in support of the court's determination.

(f) **Waiver.** A claim authorized under this rule is waived if not filed in accord with the time requirements for filing set out in this rule, unless good cause is shown for the failure to comply with the time requirements.

(g) **Finding of Mental Retardation; Order to Proceed.** If, after the evidence presented, the court is of the opinion that the defendant is mentally retarded, the court shall order the case to proceed without the death penalty as an issue.

(h) **Appeal.** An appeal may be taken by the state if the court enters an order finding that the defendant is mentally retarded, which will stay further proceedings in the trial court until a decision on appeal is rendered. Appeals are to proceed according to Florida Rule of Appellate Procedure 9.140(c).

(i) **Motion to Estabish Mental Retardation as a Bar to Execution; Stay of Execution.** The filing of a motion to establish mental retardation as a bar to execution shall not stay further proceedings without a separate order staying execution.

APPENDIX B

REPRESENTATIVE STATUTES AND CASES ADDRESSING DEFINITIONS OF MENTAL RETARDATION OR INTELLECTUAL DISABILITY FOR DEATH PENALTY PURPOSES*

ALABAMA

No statutory provision.

Ex parte Perkins, 851 So. 2d 453, 456 (Ala. 2002):

> [A] defendant, to be considered mentally retarded, must have significantly subaverage intellectual functioning (an IQ of 70 or below), and significant or substantial deficits in adaptive behavior.

Smith v. *State*, 71 So. 3d 12, 20 (Ala. Crim. App. 2008):

> In summary, Smith urges this Court to adopt a "margin of error" when examining a defendant's IQ score and then to apply that margin of error to conclude that because Smith's IQ was 72 he is mentally retarded. The Alabama Supreme Court in *Perkins* did not adopt any "margin of error" when examining a defendant's IQ score. If this Court were to adopt a "margin of error" it would, in essence, be expanding the definition of mentally retarded[.]

---

* States marked with an asterisk have eliminated the death penalty (prospectively or entirely) since adoption of the definitions excerpted in this appendix.

ARIZONA

Ariz. Rev. Stat. Ann. § 13-753:

A. In any case in which the state files a notice of intent to seek the death penalty, a person who is found to have an intellectual disability pursuant to this section shall not be sentenced to death but shall be sentenced to life or natural life.

B. If the state files a notice of intent to seek the death penalty, the court, unless the defendant objects, shall appoint a prescreening psychological expert in order to determine the defendant's intelligence quotient using current community, nationally and culturally accepted intelligence testing procedures. The prescreening psychological expert shall submit a written report of the intelligence quotient determination to the court within ten days of the testing of the defendant. ...

C. If the prescreening psychological expert determines that the defendant's intelligence quotient is higher than seventy-five, the notice of intent to seek the death penalty shall not be dismissed on the ground that the defendant has an intellectual disability. ...

D. If the prescreening psychological expert determines that the defendant's intelligence quotient is seventy-five or less, the trial court, within ten days of receiving the written report, shall order the state and the defendant to each nominate three experts in

intellectual disabilities, or jointly nominate a single expert in intellectual disabilities. ...

E. ... [E]ach expert in intellectual disability shall examine the defendant using current community, nationally and culturally accepted physical, developmental, psychological and intelligence testing procedures, for the purpose of determining whether the defendant has an intellectual disability. Within fifteen days of examining the defendant, each expert in intellectual disabilities shall submit a written report to the trial court that includes the expert's opinion as to whether the defendant has an intellectual disability. ...

F. If the scores on all the tests for intelligence quotient administered to the defendant are above seventy, the notice of intent to seek the death penalty shall not be dismissed on the ground that the defendant has an intellectual disability. ...

G. ... A determination by the trial court that the defendant's intelligence quotient is sixty-five or lower establishes a rebuttable presumption that the defendant has an intellectual disability. ...

* * *

K. For the purposes of this section, unless the context otherwise requires:

1. "Adaptive behavior" means the effectiveness or degree to which the defendant meets the standards of personal independence and social responsibil-

ity expected of the defendant's age and cultural group.

* * *

3. "Intellectual disability" means a condition based on a mental deficit that involves significantly subaverage general intellectual functioning, existing concurrently with significant impairment in adaptive behavior, where the onset of the foregoing conditions occurred before the defendant reached the age of eighteen.

* * *

5. "Significantly subaverage general intellectual functioning" means a full scale intelligence quotient of seventy or lower. The court in determining the intelligence quotient shall take into account the margin of error for the test administered.

State v. *Roque*, 141 P.3d 368, 403 (Ariz. 2006) (citation omitted):

> The statute does not refer to individual IQ subtests or indices, but rather employs a single "intelligence quotient" as an initial measure of "significantly subaverage general intellectual functioning." This number refers to the full-scale IQ .... In addition, the statute accounts for margin of error by requiring multiple tests. If the defendant achieves a full-scale score of 70 or below on any one of the tests, then the court proceeds to a hearing.

ARKANSAS

Ark. Code Ann. § 5-4-618:

(a)(1) As used in this section, "mental retardation" means:

(A) Significantly subaverage general intellectual functioning accompanied by a significant deficit or impairment in adaptive functioning manifest in the developmental period, but no later than age eighteen (18) years of age; and

(B) A deficit in adaptive behavior.

(2) There is a rebuttable presumption of mental retardation when a defendant has an intelligence quotient of sixty-five (65) or below.

(b) No defendant with mental retardation at the time of committing capital murder shall be sentenced to death.

* * *

Rankin v. *State*, 948 S.W.2d 397, 404 (Ark. 1997):

> [U]nder § 5-4-618(a)(2) ... a defendant is entitled to the presumption [of mental retardation] only if his IQ is 65 or below. ...
>
> We reject Mr. Rankin's suggestion that the Trial Court was obligated ... to "reduce" [the defendant's] scores by the possible three-point margin of error or "average" them together in some way.

CALIFORNIA

Cal. Penal Code § 1376:

(a) As used in this section, "intellectual disability" means the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before 18 years of age.

* * *

(c) In the event the hearing is conducted before the court prior to the commencement of the trial, the following shall apply:

(1) If the court finds that the defendant is a person with an intellectual disability, the court shall preclude the death penalty and the criminal trial thereafter shall proceed as in any other case in which a sentence of death is not sought by the prosecution. ...

* * *

(d) In the event the hearing is conducted before the jury after the defendant is found guilty ..., the following shall apply:

(1) If the jury finds that the defendant is a person with an intellectual disability, the court shall preclude the death penalty and shall sentence the defendant to confinement in the state prison for life without the possibility of parole.

* * *

In re Hawthorne, 105 P.3d 552, 557 (Cal. 2005) (citations omitted):

> [A] fixed cutoff is inconsistent with established clinical definitions and fails to recognize that significantly subaverage intellectual functioning may be established by means other than IQ testing. Experts also agree that an IQ score below 70 may be anomalous as to an individual's intellectual functioning and not indicative of mental impairment. Finally, IQ test scores are insufficiently precise to utilize a fixed cutoff in this context.

COLORADO

Colo. Rev. Stat. § 18-1.3-1101(2):

> "Mentally retarded defendant" means any defendant with significantly subaverage general intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested and documented during the developmental period. The requirement for documentation may be excused by the court upon a finding that extraordinary circumstances exist.

Colo. Rev. Stat. § 18-1.3-1103:

> A sentence of death shall not be imposed upon any defendant who is determined to be a mentally retarded defendant .... If any person who is determined to be a mentally retarded defendant is found guilty of a class 1 felony, such defendant shall be sentenced to life imprisonment.

CONNECTICUT*

Conn. Gen. Stat. § 1-1g:

> (a) For the purposes of sections 17a-210b and 38a-816, "mental retardation" means a significant limitation in intellectual functioning and deficits in adaptive behavior that originated during the developmental period before eighteen years of age.
>
> (b) For the purposes of section[] ... 53a-46a ..., "intellectual disability" has the same meaning as "mental retardation" as defined in subsection (a) of this section.
>
> (c) As used in subsection (a) of this section, "significant limitation in intellectual functioning" means an intelligence quotient more than two standard deviations below the mean as measured by tests of general intellectual functioning that are individualized, standardized and clinically and culturally appropriate to the individual; and "adaptive behavior" means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected for the individual's age and cultural group as measured by tests that are individualized, standardized and clinically and culturally appropriate to the individual.

Conn. Gen. Stat. § 53a-46a(h):

> The court shall not impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds by a special verdict, as provided in subsection (e), that at the time of the of-

fense ... the defendant was a person with intellectual disability, as defined in section 1-1g[.]

DELAWARE

Del. Code Ann. tit. 11, § 4209(d)(3):

a. Not later than 90 days before trial the defendant may file a motion with the Court alleging that the defendant had a serious intellectual developmental disorder at the time the crime was committed. Upon the filing of the motion, the Court shall order an evaluation of the defendant for the purpose of providing evidence of the following:

1. Whether the defendant has a significantly subaverage level of intellectual functioning;

2. Whether the defendant's adaptive behavior is substantially impaired; and

3. Whether the conditions described in paragraphs (d)(1) and (d)(2) of this section existed before the defendant became 18 years of age.

* * *

c. ... If the Court finds that the defendant has established by clear and convincing evidence that the defendant had a serious intellectual developmental disorder at the time the crime was committed, notwithstanding any other provision of this section to the contrary, the Court shall impose a sentence of imprisonment for the remainder of the defendant's natural life without

benefit of probation or parole or any other reduction. ...

d. When used in this paragraph:

1. "Adaptive behavior" means the effectiveness or degree to which the individual meets the standards of personal independence expected of the individual's age group, sociocultural background and community setting, as evidenced by significant limitations in not less than 2 of the following adaptive skill areas: communication, self-care, home living, social skills, use of community resources, self-direction, functional academic skills, work, leisure, health or safety;

2. "Serious intellectual developmental disorder" means that an individual has significantly subaverage intellectual functioning that exists concurrently with substantial deficits in adaptive behavior and both the significantly subaverage intellectual functioning and the deficits in adaptive behavior were manifested before the individual became 18 years of age; and

3. "Significantly subaverage intellectual functioning" means an intelligent quotient of 70 or below obtained by assessment with 1 or more of the standardized, individually administered general intelligence tests developed for the purpose of assessing intellectual functioning.

FLORIDA

Fla. Stat. § 921.137 (2012):[†]

> (1) As used in this section, the term "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities. The term "adaptive behavior," for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community. The Agency for Persons with Disabilities shall adopt rules to specify the standardized intelligence tests as provided in this subsection.
>
> (2) A sentence of death may not be imposed upon a defendant convicted of a capital felony if it is determined in accordance with this section that the defendant has mental retardation.
>
> * * *

[†] In the current version of the statute, references to "mental retardation" have been replaced with references to "intellectual disability."

Cherry v. *State*, 959 So. 2d 702, 712-713 (Fla. 2007):

> Both section 921.137 and rule 3.203 provide that significantly subaverage general intellectual functioning means "performance that is two or more standard deviations from the mean score on a standardized intelligence test." One standard deviation on the WAIS–III, the IQ test administered in the instant case, is fifteen points, so two standard deviations away from the mean of 100 is an IQ score of 70. As pointed out by the circuit court, the statute does not use the word approximate, nor does it reference the SEM. Thus, the language of the statute and the corresponding rule are clear.

GEORGIA

Ga. Code Ann. § 17-7-131:

> (a) For purposes of this Code section, the term:
>
> * * *
>
> (3) "Mentally retarded" means having significantly subaverage general intellectual functioning resulting in or associated with impairments in adaptive behavior which manifested during the developmental period.
>
> * * *
>
> (j) In the trial of any case in which the death penalty is sought which commences on or after July 1, 1988, should the judge find in accepting a plea of guilty but mentally retarded or the jury or court find in its verdict that the defendant is guilty of the

crime charged but mentally retarded, the death penalty shall not be imposed and the court shall sentence the defendant to imprisonment for life.

Stripling v. *State*, 401 S.E.2d 500, 504 (Ga. 1991) (citation omitted):

"Significantly subaverage intellectual functioning" is generally defined as an IQ of 70 or below. However, an IQ test score of 70 or below is not conclusive. At best, an IQ score is only accurate within a range of several points, and for a variety of reasons, a particular score may be less accurate. Moreover, persons "with IQs somewhat lower than 70" are not diagnosed as being mentally retarded if there "are no significant deficits or impairment in adaptive functioning."

IDAHO

Idaho Code Ann. § 19-2515A:

(1) As used in this section:

(a) "Mentally retarded" means significantly subaverage general intellectual functioning that is accompanied by significant limitations in adaptive functioning in at least two (2) of the following skill areas: communication, self-care, home living, social or interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety. The onset of significant subaverage general intelligence functioning and significant limi-

tations in adaptive functioning must occur before age eighteen (18) years.

(b) "Significantly subaverage general intellectual functioning" means an intelligence quotient of seventy (70) or below.

* * *

(3) If the court finds by a preponderance of the evidence that the defendant is mentally retarded, the death penalty shall not be imposed. The jury shall not be informed of the mental retardation hearing or the court's findings concerning the defendant's claim of mental retardation.

* * *

Pizzuto v. *State*, 202 P.3d 642, 651 (Idaho 2008) (citation omitted):

[W]hen enacting Idaho Code § 19-2515A(1), the legislature did not require that the IQ score be within five points of 70 or below. It required that it be 70 or below. Although Pizzuto argued that the district court should infer that Pizzuto's actual IQ was lower than his test score, the court could just as reasonably have inferred that it was higher. The alleged error in IQ testing is plus or minus five points. The district court was entitled to draw reasonable inferences from the undisputed facts. It would be just as reasonable to infer that Pizzuto's IQ on December 12, 1985, was 77 as it would be to infer that it was 67.

ILLINOIS*

725 Ill. Comp. Stat. 5/114-15:

* * *

(d) In determining whether the defendant is intellectually disabled, the intellectual disability must have manifested itself by the age of 18. IQ tests and psychometric tests administered to the defendant must be the kind and type recognized by experts in the field of intellectual disabilities. In order for the defendant to be considered intellectually disabled, a low IQ must be accompanied by significant deficits in adaptive behavior in at least 2 of the following skill areas: communication, self-care, social or interpersonal skills, home living, self-direction, academics, health and safety, use of community resources, and work. An intelligence quotient (IQ) of 75 or below is presumptive evidence of an intellectual disability.

* * *

(f) If the court determines at a pretrial hearing or after remand that a capital defendant is intellectually disabled, and the State does not appeal pursuant to Supreme Court Rule 604, the case shall no longer be considered a capital case and the procedural guidelines established for capital cases shall no longer be applicable to the defendant. ...

INDIANA

Ind. Code § 35-36-9-2:

> As used in this chapter, "individual with mental retardation" means an individual who, before becoming twenty-two (22) years of age, manifests:
>
> (1) significantly subaverage intellectual functioning; and
>
> (2) substantial impairment of adaptive behavior;
>
> that is documented in a court ordered evaluative report.

Ind. Code § 35-36-9-6:

> If the court determines that the defendant is an individual with mental retardation under section 5 of this chapter, the part of the state's charging instrument ... that seeks a death sentence against the defendant shall be dismissed.

Ind. Code § 35-36-9-7:

> If a defendant who is determined to be an individual with mental retardation under this chapter is convicted of murder, the court shall sentence the defendant under IC 35-50-2-3(a) [providing for a fixed term of imprisonment between forty-five and sixty-five years, with the advisory sentence being fifty-five years].

Pruitt v. *State*, 834 N.E.2d 90, 106 (Ind. 2005):

> IQ tests are only evidence; they are not conclusive on either the subject's IQ or the ultimate question of mental retardation.

KANSAS

Kan. Stat. Ann. § 21-6622:

* * *

(f) If, at the conclusion of a hearing pursuant to this section, the court determines that the defendant is a person with intellectual disability, the court shall sentence the defendant as otherwise provided by law, and no sentence of death, life without the possibility of parole, or mandatory term of imprisonment shall be imposed hereunder.

* * *

(h) As used in this section, "intellectual disability" means having significantly subaverage general intellectual functioning, as defined by K.S.A. 76-12b01, and amendments thereto, to an extent which substantially impairs one's capacity to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law.

Kan. Stat. Ann. § 76-12b01:

When used in this act:

* * *

(d) "Intellectual disability" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from birth to age 18.

* * *

> (i) "Significantly subaverage general intellectual functioning" means performance which is two or more standard deviations from the mean score on a standardized intelligence test specified by the secretary.
>
> * * *

State v. *Backus*, 287 P.3d 894, 905 (Kan. 2012):‡

> Backus' school records indicated that his test scores from 1993, 1999, and 2003 did not qualify him for special education services. More to the point, Backus' test score did not meet the statutory definition of mentally retarded because it was not two standard deviations or more below the mean. Accordingly, the district court did not err in finding insufficient reason to believe that Backus was mentally retarded.

KENTUCKY

Ky. Rev. Stat. Ann. § 532.130(2):

> A defendant with significant subaverage intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested during the developmental period is referred to in KRS 532.135 and 532.140 as a defendant with a serious intellectual disability. "Significantly subaverage general intellectual

---

‡ The Supreme Court of Kansas has not construed the State's statutory definition of intellectual disability in a capital case. *Backus* is not a capital case but construed an identical definition. *See Backus*, 287 P.3d at 904 (citing Kan. Stat. Ann. § 21-4634(h) (now codified at Kan. Stat. Ann. § 21-6622(h))); *see also* 2010 Kan. Sess. Laws ch. 136, § 262 (recodification).

functioning" is defined as an intelligence quotient (I.Q.) of seventy (70) or below.

Ky. Rev. Stat. Ann. § 532.135:

* * *

(4) ... If it is determined the defendant is an offender with a serious intellectual disability, he shall be sentenced as provided in KRS 532.140.

Ky. Rev. Stat. Ann. § 532.140:

(1) ... [N]o offender who has been determined to be an offender with a serious intellectual disability under the provisions of KRS 532.135, shall be subject to execution. ...

* * *

Bowling v. *Commonwealth*, 163 S.W.3d 361, 375 (Ky. 2005) (footnote omitted):

Both the potential margin of error and the "Flynn effect" were known at the time our statutes were enacted. The General Assembly chose not to expand the mental retardation ceiling by requiring consideration of those factors, but instead, like most other states that quantify the definition, chose a bright-line cut-off ceiling of an IQ of 70, a generally recognized level at which persons are considered mentally retarded.

LOUISIANA

La. Code Crim. Proc. Ann. art. 905.5.1:

> A. Notwithstanding any other provisions of law to the contrary, no person who is mentally retarded shall be subjected to a sentence of death.
>
> * * *
>
> H. (1) "Mental retardation" means a disability characterized by significant limitations in both intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills. The onset must occur before the age of eighteen years.
>
> * * *

State v. *Dunn*, 41 So. 3d 454, 470 (La. 2010) (footnote omitted):

> As discussed previously, I.Q. scores are not exact and represent a range, generally considered to be five points in either direction, in which the actual score falls. Even within said range, there is still only a 95% confidence level the subject's true I.Q. is represented. As part of the representation for the *Atkins* hearing, the defendant was tested three times, and received I.Q. scores of 69, 75, and 75. The ranges associated with the two scores of 75 brush the threshold score for a mental retardation diagnosis; however, it is possible for someone with an I.Q. score higher than 70 to be considered mentally retarded if his adaptive functioning is substantially impaired.

MARYLAND*

Md. Code Ann., Crim. Law § 2-202(b):

* * *

(1) In this subsection, a defendant is "mentally retarded" if:

(i) the defendant had significantly below average intellectual functioning, as shown by an intelligence quotient of 70 or below on an individually administered intelligence quotient test and an impairment in adaptive behavior; and

(ii) the mental retardation was manifested before the age of 22 years.

(2) A defendant may not be sentenced to death, but shall be sentenced to imprisonment for life without the possibility of parole ... if the defendant:

* * *

(ii) proves by a preponderance of the evidence that at the time of the murder the defendant was mentally retarded.

MISSISSIPPI

No statutory provision.

Chase v. *State*, 873 So. 2d 1013, 1029 n.20 (Miss. 2004) (en banc) (citation omitted):

[T]he cutoff score for the intellectual functioning prong of the test is 75. Thus, defendants with an IQ of 76 or above do not qualify for Eighth Amendment *Atkins* protection.

MISSOURI

Mo. Rev. Stat. § 565.030:

* * *

4. ... The trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor:

   (1) If the trier finds by a preponderance of the evidence that the defendant is mentally retarded[.]

* * *

6. As used in this section, the terms "mental retardation" or "mentally retarded" refer to a condition involving substantial limitations in general functioning characterized by significantly subaverage intellectual functioning with continual extensive related deficits and limitations in two or more adaptive behaviors such as communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work, which conditions are manifested and documented before eighteen years of age.

* * *

Goodwin v. *State*, 191 S.W.3d 20, 30-31 (Mo. 2006) (en banc) (footnote omitted):

In fact, Goodwin has eight independent intelligence tests spread over twenty years that indicated that Goodwin is not retarded. Only one of these tests is even arguably within a five-

point margin of error attributed to the Wechsler scale, and it is inadequate to raise a triable issue of fact. Goodwin cannot make the initial showing of "significantly subaverage intellectual functioning" as demonstrated by his IQ, which places him consistently in the mid-seventies to eighties.

NEBRASKA

Neb. Rev. Stat. § 28-105.01:

* * *

(2) Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person with an intellectual disability.

(3) As used in subsection (2) of this section, intellectual disability means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior. An intelligence quotient of seventy or below on a reliably administered intelligence quotient test shall be presumptive evidence of intellectual disability.

* * *

State v. *Vela*, 777 N.W.2d 266, 304-305 (Neb. 2010) (footnote omitted):

[T]he [district] court found that Vela's full-scale score of 75 on the WAIS-III should be considered, in light of the standard error of measurement, to include a "range between 75 and 70." ... The State argues that although the district court properly "relied upon an unchallenged IQ score of 75, which is the highest pos-

sible score professionally considered to possibly raise a question of mental retardation," it should not have considered the range of scores produced by the standard error of measurement when determining whether Vela had established that he had significantly subaverage general intellectual functioning. Because, as explained below, we agree with the district court that Vela failed to show deficits in his adaptive behavior and thus is not a person with mental retardation, we decline to address the State's argument.

NEVADA

Nev. Rev. Stat. § 174.098:

* * *

6. If the court determines based on the evidence presented at a hearing conducted pursuant to subsection 2 that the defendant is intellectually disabled, the court must make such a finding in the record and strike the notice of intent to seek the death penalty. Such a finding may be appealed to the Supreme Court pursuant to NRS 177.015.

7. For the purposes of this section, "intellectually disabled" means significant subaverage general intellectual functioning which exists concurrently with deficits in adaptive behavior and manifested during the developmental period.

Ybarra v. *State*, 247 P.3d 269, 274 (Nev. 2011) (en banc) (citations omitted):

> The first concept—significant limitations in intellectual functioning—has been measured in large part by intelligence (IQ) tests. Because "there is a measurement error of approximately 5 points in assessing IQ," which may vary depending on the particular intelligence test given, the clinical definitions indicate that "individuals with IQs between 70 and 75" fall into the category of subaverage intellectual functioning. Although the focus with this element of the definition often is on IQ scores, that is not to say that objective IQ testing is required to prove mental retardation. Other evidence may be used to demonstrate subaverage intellectual functioning, such as school and other records.

NEW JERSEY*

No statutory provision.

State v. *Jimenez*, 908 A.2d 181, 184 n.3 (N.J. 2006) (citation omitted):

> Both the trial court and the Appellate Division accepted the definition of mental retardation found in the DSM-IV as the standard to be met when an *Atkins* claim is raised. That standard has not been challenged by the defendant or the State. ... Because the DSM-IV definition recognizes a measurement error of five points in assessing I.Q., persons with I.Q.s between 70 and 75 who exhibit significant deficits in adaptive behavior may be mentally retarded. Moreover, impairments in adaptive functioning,

and not low I.Q., are generally the presenting indicators of mental retardation. Persons with mild mental retardation I.Q. levels of 50-55 to approximately 70 represent the largest subgroup (about 85%) of the mentally retarded.

NEW MEXICO*

N.M. Stat. Ann. § 31-20A-2.1:

A. As used in this section, "mentally retarded" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior. An intelligence quotient of seventy or below on a reliably administered intelligence quotient test shall be presumptive evidence of mental retardation.

B. The penalty of death shall not be imposed on any person who is mentally retarded.

* * *

NEW YORK*

N.Y. Crim. Proc. Law § 400.27(12)(e):

The foregoing provisions of this subdivision notwithstanding, at a reasonable time prior to the commencement of trial the defendant may, upon a written motion alleging reasonable cause to believe the defendant is mentally retarded, apply for an order directing that a mental retardation hearing be conducted prior to trial. If, upon review of the defendant's motion and any response thereto, the court finds reasonable cause to believe the defendant is mentally retarded, it shall promptly conduct a hearing

without a jury to determine whether the defendant is mentally retarded. In the event the court finds after the hearing that the defendant is not mentally retarded, the court must, prior to commencement of trial, enter an order so stating, but nothing in this paragraph shall preclude a defendant from presenting mitigating evidence of mental retardation at a separate sentencing proceeding. In the event the court finds after the hearing that the defendant, based upon a preponderance of the evidence, is mentally retarded, the court must, prior to commencement of trial, enter an order so stating. Unless the order is reversed on an appeal by the people or unless the provisions of paragraph (d) of this subdivision apply, a separate sentencing proceeding under this section shall not be conducted if the defendant is thereafter convicted of murder in the first degree. In the event a separate sentencing proceeding is not conducted, the court, upon conviction of a defendant for the crime of murder in the first degree, shall sentence the defendant to life imprisonment without parole or to a sentence of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole. ... For purposes of this subdivision and paragraph (b) of subdivision nine of this section, "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior which were manifested before the age of eighteen.

NORTH CAROLINA

N.C. Gen. Stat. § 15A-2005:

(a)(1) The following definitions apply in this section:

a. Mentally retarded.—Significantly subaverage general intellectual functioning, existing concurrently with significant limitations in adaptive functioning, both of which were manifested before the age of 18.

b. Significant limitations in adaptive functioning.—Significant limitations in two or more of the following adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure skills and work skills.

c. Significantly subaverage general intellectual functioning.—An intelligence quotient of 70 or below.

(2) The defendant has the burden of proving significantly subaverage general intellectual functioning, significant limitations in adaptive functioning, and that mental retardation was manifested before the age of 18. An intelligence quotient of 70 or below on an individually administered, scientifically recognized standardized intelligence quotient test administered by a licensed

> psychiatrist or psychologist is evidence of significantly subaverage general intellectual functioning; however, it is not sufficient, without evidence of significant limitations in adaptive functioning and without evidence of manifestation before the age of 18, to establish that the defendant is mentally retarded.
>
> (b) Notwithstanding any provision of law to the contrary, no defendant who is mentally retarded shall be sentenced to death.
>
> * * *

State v. *Locklear*, 681 S.E.2d 293, 311 (N.C. 2009) (citations omitted):

> [T]he jury often has the unenviable task of identifying "gray area" defendants; that is, those offenders who are not *clearly* mentally retarded but who may nevertheless present enough evidence of mental retardation to render them ineligible for the death penalty. Notably, the defendant's burden of production and persuasion to show mental retardation to the jury at the sentencing stage is lower than that required at the pretrial hearing stage. The defendant must only "demonstrate mental retardation to the jury by a preponderance of the evidence." The lesser burden of proof indicates legislative awareness of "gray area" defendants and lawmakers' intent to protect against the inadvertent execution of mentally retarded offenders.

OHIO

No statutory provision.

State v. *Lott*, 779 N.E.2d 1011, 1014 (Ohio 2002) (per curiam) (citation omitted):

> While IQ tests are one of the many factors that need to be considered, they alone are not sufficient to make a final determination on this issue. We hold that there is a rebuttable presumption that a defendant is not mentally retarded if his or her IQ is above 70.

OKLAHOMA

Okla. Stat. tit. 21, § 701.10b:

A. For purposes of this section:

1. "Mental retardation" or "mentally retarded" means significantly subaverage general intellectual functioning, existing concurrently with significant limitations in adaptive functioning;

2. "Significant limitations in adaptive functioning" means significant limitations in two or more of the following adaptive skill areas; communication, self-care, home living, social skills, community use, self-direction, health, safety, functional academics, leisure skills and work skills; and

3. "Significantly subaverage general intellectual functioning" means an intelligence quotient of seventy (70) or below.

B. Regardless of any provision of law to the contrary, no defendant who is mentally re-

tarded shall be sentenced to death; provided, however, the onset of the mental retardation must have been manifested before the defendant attained the age of eighteen (18) years.

C. ... An intelligence quotient of seventy (70) or below on an individually administered, scientifically recognized standardized intelligence quotient test administered by a licensed psychiatrist or psychologist is evidence of significantly subaverage general intellectual functioning; however, it is not sufficient without evidence of significant limitations in adaptive functioning and without evidence of manifestation before the age of eighteen (18) years. In determining the intelligence quotient, the standard measurement of error for the test administrated shall be taken into account.

However, in no event shall a defendant who has received an intelligence quotient of seventy-six (76) or above on any individually administered, scientifically recognized, standardized intelligence quotient test administered by a licensed psychiatrist or psychologist, be considered mentally retarded and, thus, shall not be subject to any proceedings under this section.

* * *

E. The district court shall conduct an evidentiary hearing to determine whether the defendant is mentally retarded. If the court determines, by clear and convincing evidence, that the defendant is mentally re-

> tarded, the defendant, if convicted, shall be sentenced to life imprisonment or life without parole. ...
>
> * * *

Smith v. *State*, 245 P.3d 1233, 1237 (Okla. Crim. App. 2010):

> [W]hile the language of section 701.10b directs that an I.Q. score near the cutoff of 70 be treated as a range bounded by the limits of error, it also directs unequivocally that no such treatment be afforded to scores of 76 or above. ... By directing that no defendant be considered mentally retarded who has received an I.Q. score of 76 or above on *any* scientifically recognized standardized test, the Legislature has implicitly determined that any scores of 76 or above are in a range whose lower error-adjusted limit will always be above the threshold score of 70.

Murphy v. *State*, 281 P.3d 1283, 1288 (Okla. Crim. App. 2012):

> The Legislature has given capital defendants in Oklahoma the benefit of the standard measurement of error for the intelligence quotient test administered.

PENNSYLVANIA

No statutory provision.

Commonwealth v. *Miller*, 888 A.2d 624, 630, 631 (Pa. 2005) (citations omitted):

> Limited or subaverage intellectual capability is best represented by IQ scores, which are approximately two standard deviations (or 30 points) below the mean (100). The concept should also take into consideration the standard error of measurement (hereinafter "SEM") for the specific assessment instruments used. The SEM has been estimated to be three to five points for well-standardized measures of general intellectual functioning. Thus, for example, a subaverage intellectual capability is commonly ascribed to those who test below 65-75 on the Wechsler scales. ...
>
> * * *
>
> [W]e do not adopt a cutoff IQ score for determining mental retardation in Pennsylvania, since it is the interaction between limited intellectual functioning and deficiencies in adaptive skills that establish mental retardation.

SOUTH CAROLINA

S.C. Code Ann. § 16-3-20:

* * *

> (C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, mitigating circumstances otherwise authorized or allowed by law and the following statutory aggravating and mitigat-

ing circumstances which may be supported by the evidence:

* * *

(b) Mitigating circumstances:

* * *

(10) The defendant had mental retardation at the time of the crime. "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

* * *

Franklin v. *Maynard*, 588 S.E.2d 604, 605 (S.C. 2003) (per curiam) (footnote omitted):

> We find it inappropriate to create a definition of mental retardation [for purposes of *Atkins*] different from the one already established by the legislature in S.C. Code Ann. § 16-3-20(C)(b)(10) (2003) (mental retardation is a statutory mitigating circumstance). Section 16-3-20(C)(b)(10) defines mental retardation as: "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period."

SOUTH DAKOTA

S.D. Codified Laws § 23A-27A-26.1:

> Notwithstanding any other provision of law, the death penalty may not be imposed upon

any person who was mentally retarded at the time of the commission of the offense and whose mental retardation was manifested and documented before the age of eighteen years.

S.D. Codified Laws § 23A-27A-26.2:

As used in §§ 23A-27A-26.1 to 23A-27A-26.7, inclusive, mental retardation means significant subaverage general intellectual functioning existing concurrently with substantial related deficits in applicable adaptive skill areas. An intelligence quotient exceeding seventy on a reliable standardized measure of intelligence is presumptive evidence that the defendant does not have significant subaverage general intellectual functioning.

TENNESSEE

Tenn. Code Ann. § 39-13-203:

(a) As used in this section, "intellectual disability" means:

(1) Significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below;

(2) Deficits in adaptive behavior; and

(3) The intellectual disability must have been manifested during the developmental period, or by eighteen (18) years of age.

(b) Notwithstanding any provision of law to the contrary, no defendant with intellectual

> disability at the time of committing first degree murder shall be sentenced to death.
>
> * * *

Coleman v. *State*, 341 S.W.3d 221, 241 (Tenn. 2011):

> The statute does not require a "functional intelligence quotient *test score* of seventy (70) or below." Because the statute does not specify how a criminal defendant's functional I.Q. should be determined, we have concluded that the trial courts may receive and consider any relevant and admissible evidence regarding whether the defendant's functional I.Q. at the time of the offense was seventy (70) or below.

TEXAS

No statutory provision.

Ex parte Briseno, 135 S.W.3d 1, 7 n.24 (Tex. Crim. App. 2004) (citation omitted):

> Psychologists and other mental health professionals are flexible in their assessment of mental retardation; thus, sometimes a person whose IQ has tested above 70 may be diagnosed as mentally retarded while a person whose IQ tests below 70 may not be mentally retarded. Furthermore, IQ tests differ in content and accuracy.

UTAH

Utah Code Ann. § 77-15a-101(1):

> A defendant who is found by the court to be mentally retarded as defined in Section 77-15a-102 is not subject to the death penalty.

Utah Code Ann. § 77-15a-102:

> As used in this chapter, a defendant is "mentally retarded" if:
>
> (1) the defendant has significant subaverage general intellectual functioning that results in and exists concurrently with significant deficiencies in adaptive functioning that exist primarily in the areas of reasoning or impulse control, or in both of these areas; and
>
> (2) the subaverage general intellectual functioning and the significant deficiencies in adaptive functioning under Subsection (1) are both manifested prior to age 22.

State v. *Maestas*, 299 P.3d 892, 948 (Utah 2012), *cert. denied*, 133 S. Ct. 1634 (2013) (footnote omitted):

> But we note that IQ scores are just one factor to be considered in determining if the defendant has [significantly subaverage general intellectual functioning]. The testing instrument or other circumstances may result in an IQ score that does not truly reflect a defendant's intellectual functioning. Thus, courts should carefully consider other relevant evidence of intellectual impairment. This is particularly true when the defendant's IQ score falls in the range spanning the cusp of clinical mental retardation.

VIRGINIA

Va. Code Ann. § 19.2-264.3:1.1:

A. As used in this section and § 19.2-264.3:1.2, the following definition applies:

> "Mentally retarded" means a disability, originating before the age of 18 years, characterized concurrently by (i) significantly subaverage intellectual functioning as demonstrated by performance on a standardized measure of intellectual functioning administered in conformity with accepted professional practice, that is at least two standard deviations below the mean and (ii) significant limitations in adaptive behavior as expressed in conceptual, social and practical adaptive skills.

B. Assessments of mental retardation under this section and § 19.2-264.3:1.2 shall conform to the following requirements:

1. Assessment of intellectual functioning shall include administration of at least one standardized measure generally accepted by the field of psychological testing and appropriate for administration to the particular defendant being assessed, taking into account cultural, linguistic, sensory, motor, behavioral and other individual factors. Testing of intellectual functioning shall be carried out in conformity with accepted professional practice, and whenever indicated, the assessment shall include infor-

> mation from multiple sources. The Commissioner of Behavioral Health and Developmental Services shall maintain an exclusive list of standardized measures of intellectual functioning generally accepted by the field of psychological testing.
>
> * * *

Johnson v. *Commonwealth*, 591 S.E.2d 47, 59 (Va. 2004), *vacated and remanded on other grounds*, 544 U.S. 901 (2005):

> The record also shows that Johnson was administered two standardized tests, commonly known as I.Q. tests, which met the descriptive criteria of Code § 19.2-264.3:1.1(A)(i). His scores of 75 and 78 on these I.Q. tests exceed the score of 70 that the General Assembly has chosen as the threshold score below which one may be classified as being mentally retarded.

WASHINGTON

Wash. Rev. Code § 10.95.030:

* * *

> (2) ... In no case, however, shall a person be sentenced to death if the person had an intellectual disability at the time the crime was committed, under the definition of intellectual disability set forth in (a) of this subsection. A diagnosis of intellectual disability shall be documented by a licensed psychiatrist or licensed psychologist designated by the court, who is an expert in the diagnosis and evaluation of intellectual dis-

abilities. The defense must establish an intellectual disability by a preponderance of the evidence and the court must make a finding as to the existence of an intellectual disability.

(a) "Intellectual disability" means the individual has: (i) Significantly subaverage general intellectual functioning; (ii) existing concurrently with deficits in adaptive behavior; and (iii) both significantly subaverage general intellectual functioning and deficits in adaptive behavior were manifested during the developmental period.

(b) "General intellectual functioning" means the results obtained by assessment with one or more of the individually administered general intelligence tests developed for the purpose of assessing intellectual functioning.

(c) "Significantly subaverage general intellectual functioning" means intelligence quotient seventy or below.

(d) "Adaptive behavior" means the effectiveness or degree with which individuals meet the standards of personal independence and social responsibility expected for his or her age.

(e) "Developmental period" means the period of time between conception and the eighteenth birthday.

UNITED STATES

18 U.S.C. § 3596(c):

> Mental capacity.—A sentence of death shall not be carried out upon a person who is mentally retarded. A sentence of death shall not be carried out upon a person who, as a result of mental disability, lacks the mental capacity to understand the death penalty and why it was imposed on that person.

Ortiz v. *United States*, 664 F.3d 1151, 1168 (8th Cir. 2011), *cert. denied*, 133 S. Ct. 2763 (2013):

> Ortiz is correct in his assertion that his test scores, viewed in isolation, could support a finding of mental retardation. But such test scores are imprecise and standing alone cannot support a diagnosis. Instead, qualified experts must interpret those results for the subject individual. *See Wiley* v. *Epps*, 625 F.3d 199, 215, 217 (5th Cir. 2010) (explaining "'[t]he calculation of a person's IQ score is imprecise at best and may come down to a matter of the examiner's judgment'" ...).

United States v. *Davis*, 611 F. Supp. 2d 472, 475 (D. Md. 2009) (citation omitted):

> A "significant" limitation in intellectual functioning is best represented by an IQ score that is approximately two standard deviations below the mean as measured by appropriate instruments, and in consideration of the standard error of measurement (SEM). Most standardized IQ assessment tests are normalized so that the average score is 100 with a standard devia-

tion of 15. Therefore, an IQ score two standard deviations below the mean—the benchmark for mental retardation—is approximately 70. However, the SEM in IQ assessments is approximately 5 points, therefore raising the operational definition of mental retardation to 75.

Vocational Plans	Educational Plans	Work Away From Home	Travel and Vacation Experiences	Special Interests and Hobbies	[illegible] Teacher

15. G ANCE AND COUNSELING

Teacher or Counselor	Special Interests, Observations, Suggestions, and Recommendations	Follow-up	Date
[illegible] Johnson	His mental [illegible] far below his chronological age. I have [illegible] to be [illegible] attention and extra [illegible] He is slow [illegible]	Providing [illegible] that will [illegible] his mental [illegible] Special teacher	[illegible]
[illegible] Johnson			
[illegible] Diggs			
[illegible] P. Moore	Mentally retarded.		[illegible]
[illegible] Cate W[illegible]	[illegible]	Mentally [illegible]	
[illegible] Gaines	Mentally Retarded	Special teacher	
[illegible] P. Moore	Mentally retarded	" "	[illegible]
[illegible] E. Abney	" "		

RESPONDENT'S BRIEF

No. 12-10882

In the Supreme Court of the United States

FREDDIE LEE HALL,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Writ of Certiorari to the
Florida Supreme Court

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

In *Atkins v. Virginia*, 536 U.S. 304 (2002), this Court held that the Eighth Amendment prohibits the execution of the mentally retarded. Citing evidence primarily consisting of State statutes (including the Florida statute at issue here), the Court found a nationwide consensus supporting the prohibition. The Court noted that, "[t]o the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded," and expressly "le[ft] to the states the task of developing appropriate ways to enforce the constitutional restriction." *Id.* at 317.

The question presented is whether the Eighth Amendment requires Florida to use a clinical definition of mental retardation, including incorporation of a "standard error of measurement" for intelligence tests, in its framework for identifying which offenders are exempt from the death penalty under *Atkins v. Virginia*.

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INTRODUCTION

Petitioner Freddie Lee Hall was convicted of murdering Karol Hurst, a pregnant, twenty-one year old newlywed. He was separately convicted of murdering sheriff's deputy Lonnie Coburn, who encountered Hall shortly after Hurst's murder. Seeking to avoid execution, Hall claims he is mentally retarded and ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2002). Hall makes no claim that he satisfies Florida's definition for mental retardation, insisting instead that Florida's definition must yield to medical or clinical criteria. But clinicians do not make Eighth Amendment determinations, and Florida's law is an appropriate means of enforcing *Atkins*. Moreover, the record of Hall's mental capacity, accumulated in over three decades of legal proceedings, shows that the State accurately determined that Hall is not "so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." *Id.* at 317.[1]

STATEMENT OF THE CASE

A. Hall's Crimes and Mental Ability

After robbing several convenience stores over a period of weeks in 1978, Hall and his accomplice, Mack Ruffin, planned to rob again. 1993 Appeal ROA

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[1] Consistent with the constant change in the field, there has been a recent shift in terminology, and the term "intellectual disability" now prevails. *See* Pet'r Br. 1 n.1. To maintain consistency with Petitioner's brief and the decisions below, this Brief uses "mental retardation."

v.9 R.1606, v.4 R.614;[2] JA8-9. They sought a car to use in their crime, and Karol Hurst, whom they saw walking out of a grocery store, had one. So Hall kidnapped her. He then drove Hurst's car (with Hurst in it) to a wooded area, with Ruffin following in another car. After Hurst begged for her life and the life of her unborn child, Hall and Ruffin beat her, raped her, and killed her. JA8-10; 1993 ROA v.9 R.1505-06.

Then equipped with a getaway car, the men went to the store they planned to rob. Once inside, though, they found too many customers and aborted the robbery. Meanwhile, a suspicious store clerk alerted authorities, and Deputy Coburn responded to the scene. JA9. Outside the store, Deputy Coburn approached the men and attempted to frisk them. Hall then grabbed Coburn, a struggle ensued, and Coburn was shot and killed. 1993 ROA v.9 R.1509-10. Hall and Ruffin immediately fled the scene, with Hall driving and Ruffin shooting at pursuing officers. JA9, 42-43, 56-57.

After their apprehension, both men provided accounts blaming the other for the crimes. *Compare Ruffin v. Dugger*, 848 F.2d 1512, 1514 (11th Cir. 1988) (per curiam), *with Hall v. Dugger*, 531 So. 2d 76, 77 (Fla. 1988); *see also* Pet'r Br. 8-9.

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[2] Pursuant to the Florida Rules of Appellate Procedure, the Florida Supreme Court's review of Hall's case included records associated with his previous appeals. *See* FLA. R. APP. P. 9.142(a)(1). References to materials not reproduced in the Joint Appendix are identified by the associated Florida Supreme Court appeal.

The 1978 kidnapping, rape, and murders were not Hall's first crimes. A decade earlier, he was convicted of assault with intent to commit rape—a crime in which he gouged his victim's eyes hoping to prevent his identification. 1993 ROA v.9 R.1476-77. (Although Hall received a twenty-year sentence, *id.*, he was paroled in time to commit the 1978 rape and murders, JA31.) The 1968 conviction supported one of three aggravating factors in Hall's original sentence for Hurst's murder; the others were that he committed the murder during the commission of kidnapping and robbery and that the murder was especially heinous, atrocious, or cruel.[3] JA14.

Throughout the next three decades, Hall filed multiple appeals, habeas petitions, and motions to overturn his sentence. For ten years, he asserted no claim based on mental retardation. Indeed, Hall was found to have "intelligence [] within the average range" in a pretrial evaluation two months after the murders.[4] 1993 ROA v.12 R.1956-59. Hall did claim diminished capacity to appreciate the criminality of his conduct, though he based that claim on drug use.

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[3] In Hall's 1990 resentencing, the court found four additional aggravating factors: that the crimes were i) committed while Hall was on parole for the 1968 assault; ii) committed for pecuniary gain; iii) cold, calculated, and premeditated; and iv) committed to avoid arrest. JA30-34.

[4] During this evaluation, Hall reportedly told the court-appointed doctor that he had "put it on like I was crazy" during a 1965 military physical, after which he was rated 4-F for low intellectual capacity. 1993 ROA v.12 R.1952-53; *id.* v.1 R.367 (1968 Pre-Sentence Report) ("[Hall] claimed . . . he played dumb to stay out of the service"). Hall's experts later testified that they doubted his ability to fool the draft board. *Id.* v.11 R.1767-68.

JA13. Hall also repeatedly argued that the evidence was insufficient to show that he intended Hurst's death, contending that Ruffin alone raped, beat, and murdered Hurst. Courts unanimously rejected this argument. *See* JA10; *Hall v. State*, 420 So. 2d 872, 874 (Fla. 1982); *Hall v. Wainwright*, 733 F.2d 766, 770-71 (11th Cir. 1984), *cert. denied*, 471 U.S. 1107 (1985).

In 1988, for the first time, Hall claimed mental retardation. Following *Hitchcock v. Dugger*, 481 U.S. 393 (1986), the Florida Supreme Court ordered a new sentencing to allow evidence of all mitigating factors, including mental retardation. JA17-22. After a six-day proceeding in December 1990, another jury again recommended a death sentence, and another judge again accepted the recommendation. In a detailed, 32-page order, Judge Tombrink noted that the evidence of mental retardation was largely uncontroverted but expressed skepticism of Hall's experts who "were guilty of some professional overkill." JA42. He concluded that the experts' assessments were inconsistent with facts in the record and could not explain "how a psychotic, mentally-retarded, brain-damaged, learning-disabled, speech-impaired person" could: i) formulate the plan for the theft of the car and the aborted store robbery; ii) kidnap Hurst and drive her through Leesburg and to the murder site; iii) drive the getaway car after Coburn's murder in a successful effort to evade police; iv) evade the initial manhunt; v) before the crime, live a more or less normal life for five years on probation for his 1968 conviction; or vi) make the statements he made when he testified at his first trial, which focused on blaming others and were "no different than those made by the 'normal' defendant in almost any criminal trial con-

ducted." JA42-43. Nevertheless, Judge Tombrink concluded that Hall had established mental retardation as a mitigating factor under *Penry v. Lynaugh*, 492 U.S. 302 (1989).[5] But he concluded that the mitigators did not outweigh the aggravators.[6]

Hall's latest claims regarding his mental status came after Florida enacted section 921.137 and this Court decided *Atkins*.[7]

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[5] "[M]ental retardation for purposes of *Atkins*, and mental retardation as one mitigator to be weighed against aggravators, are discrete issues." *Bobby v. Bies*, 556 U.S. 825, 829 (2009). Regardless, at the resentencing stage, "Hall's evidence [regarding mental retardation] went unchallenged, whereas in 2010, there was a true adversarial testing of whether Hall was mentally retarded under Florida's statutory definition of mental retardation." JA129 (Pariente, J., concurring).

[6] In appealing this order, Hall highlighted, as he does here, that Ruffin eventually received a life sentence for murdering Hurst. *See* Pet'r Br. 9. But as the Florida Supreme Court noted, Ruffin was younger than Hall, had no criminal history, and, unlike Hall, was not on parole for a violent crime at the time of the murder. JA71-72.

[7] In the interim, Hall filed another post-conviction motion, alleging (among other things) that he was not competent at resentencing. At a hearing, again before Judge Tombrink, Hall's attorney from the resentencing provided testimony regarding this claim. Significantly, he testified that the legal team made a strategic decision not to present testimony from Dr. Harry Krop, an evaluating expert, because Dr. Krop learned more about the facts of the crimes than did other experts and found that some aspects of his evaluation of Hall "did not equate into certain of the actions" of the crimes. 1999 ROA v.7 Tr.252. The court rejected the incompetency claim, with Judge Tombrink giving "great weight" to his opportunity to observe Hall and hear from

B. Florida's Means for Identifying Mentally Retarded Defendants

In 2001, the year before *Atkins*, Florida enacted a statute prohibiting the execution of the mentally retarded. Rather than create a new definition, the new law adopted nearly verbatim a definition from longstanding Florida law regarding treatment for the mentally retarded. *See* Fla. S. Comm. on Crim. Justice, CS for SB 238 (2001) Staff Analysis 11 (Feb. 14. 2001) ["Senate Staff Analysis"]; *see also* FLA. STAT. § 393.063 (2013). This definition requires a showing of: "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18." FLA. STAT. § 921.137(1) (2013). The statute further defines "significantly subaverage general intellectual functioning," as "performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities." *Id.*

Section 921.137 expressly applied only to those sentenced after its effective date. *Id.* § 921.137(8). But following *Atkins*, the Florida Supreme Court promulgated Florida Rule of Criminal Procedure 3.203, which governs all *Atkins* claims and incorporates that statute's definition. *See* Fla. R. Crim. P. 3.203(b); *see also* JA120. Under Rule 3.203, a defendant must provide the reports of any expert evaluations, and the court may appoint experts to conduct additional evaluations. *Id.* R. 3.203(c)(2). If there has been no

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him at various proceedings. JA86. The Florida Supreme Court affirmed. JA91.

evaluation, the court must appoint two experts to conduct them. *Id.* R. 3.203(c)(3). The court must then conduct an evidentiary hearing and consider the experts' findings "and all other evidence on the issue of whether the defendant is mentally retarded." *Id.* R. 3.203(e). To prevail, the defendant must prove mental retardation by clear and convincing evidence. *Franqui v. State*, 59 So. 3d 82, 92 (Fla. 2011).

C. Hall's *Atkins* Hearing and the Court's Ruling

The trial court held a two-day evidentiary hearing on Hall's Rule 3.203 motion. At the outset, it granted the State's motion *in limine* to require Hall to present evidence satisfying the first prong of the statute's three-part definition—significantly subaverage intellectual functioning—before proceeding to the others. JA168. Notwithstanding its motion, the State made clear that it had no objection to Hall's proffering evidence regarding the other two prongs, even though it would be irrelevant absent sufficient proof on the first prong. JA158.

Hall presented evidence relating to all three prongs. *See* JA169-70, 174-77. Dr. Valerie McClain testified regarding the clinical definitions of mental retardation; Lugene Ellis and James Hall testified regarding Hall's upbringing and capabilities as a child; Dr. Krop, who had testified in a 1997 hearing, *see supra* n.7, testified about his 1990 assessment of Hall; and Dr. Gregory Prichard testified about his 2002 assessment and resulting report. *See* JA103-05.[8] In

[8] The court appointed a fourth expert, Dr. Harry McClaren, to assist the State and evaluate Hall. *See* 2012 ROA v.1 R.147-

addition, on Hall's motion, the Court took judicial notice of portions of the 1990 resentencing record. JA171-73.

Regarding the first prong, Hall's records showed the following intelligence scores:

Year	Age	IQ Score
1968	23	76
1979	33	79
1986	41	80
1988	43	60
1990	44	73
1995	50	74
2001	56	69
2002	57	71
2008	63	72

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50. Dr. McClaren's report noted that Hall described a history of alcohol abuse, used speech that was "coherent and understandable," and discussed possible hallucinations. *Id.* R.149. Dr. McClaren concluded that he could not rule out a cognitive disorder, that Hall operated in the borderline range of intellect, and that "[r]ecent decreases in measured IQ" might be attributable to "changes in his mental condition associated with symptoms of Psychosis." *Id.* R.149-50. Dr. McClaren's report was not introduced into evidence at the hearing.

Hall attempted to introduce a report from a fifth expert, Dr. William Mosman, who examined Hall in 2001 but died before the hearing. The court excluded this report, JA105-07, the Florida Supreme Court affirmed the exclusion, JA125, and Hall does not challenge that ruling here. Hall's reliance on this excluded evidence, *e.g.*, Pet'r Br. 52, is therefore unwarranted.

See JA107-08, 389, 442-50, 512, 525.[9]

The court denied Hall's Rule 3.203 motion. It noted that Doctors Krop and Prichard measured Hall's IQ at 73 and 71, respectively, while the other test scores Dr. Prichard summarized were above 70. The court concluded that Hall did not satisfy the intellectual functioning prong because he could not establish an IQ two standard deviations below the mean. Because Hall had to satisfy all three prongs, that fact alone ended Hall's claim. JA107-09. In an "abundance of caution," though, the court evaluated Hall's evidence on adaptive functioning and age of onset and found that Hall failed to establish either additional prong. JA109-13. Finally, although the standard of proof is clear and convincing evidence, the court stated that its conclusion would be the same under a preponderance-of-evidence standard.[10] JA113-14.

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[9] The 2001 test (by Dr. Mosman) is not in the evidentiary record. *See supra* n.8. In response to Hall's objection, the court also excluded Dr. Joseph Sesta's 2008 test, but it did accept Dr. Pritchard's inclusion of that score in his analysis. *See* JA107-08, 371. Dr. Pritchard did not rely on the 1988 or 1995 results in his summary. *See* JA108, 442-50.

[10] The court cited multiple factors in support of its findings. First, Hall was required to prove adaptive deficits concurrent with his IQ testing, that is, while incarcerated. JA110 (citing *Phillips v. State*, 984 So. 2d 503, 510 (Fla. 2008)). Hall presented no such evidence. Nor could he, as none of Hall's experts reviewed materials regarding Hall's functioning in prison, and Dr. Pritchard based his analysis on information from decades before. JA109-12; *see also* JA111 (quoting Dr. Prichard's testimony: "I have done adaptive behavior testing with prison guards before, current adaptive testing. I didn't do it in this case. I don't know why I didn't do it . . . But I did not interview a Department of

The Florida Supreme Court affirmed, reiterating that section 921.137 requires an IQ score below 70, and noting that it had repeatedly found the statute consistent with *Atkins*. JA122-24. The court also rejected Hall's arguments that the trial court improperly limited evidence on the other two prongs, *see supra* n.8; JA124-25, and that earlier mitigation findings regarding mental retardation bound the *Atkins* determination. JA125-26 (citing *Bobby v. Bies*, 556 U.S. 825 (2009)).

SUMMARY OF ARGUMENT

In *Atkins v. Virginia*, this Court held that the Eighth Amendment forbids the execution of the mentally retarded. 536 U.S. 304 (2002). Although the Court found a national consensus against the practice generally, it noted there was no consensus about how to determine "which offenders are in fact retarded." *Id.* at 317. Indeed, the Court recognized that "[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." *Id.* Therefore, rather than establish a fixed, national standard to determine which defendants are "so impaired," the Court left "to the States the task of developing appropriate ways to enforce the constitutional restriction." *Id.* (quoting *Ford v. Wain-*

Corrections person.") (ellipses in order). Second, Hall failed to provide sufficient evidence regarding his intelligence before age 18, rendering him unable to satisfy the third prong. JA112-13. Although Hall argues that he put on "overwhelming evidence of mental retardation," Pet'r Br. 18, he does not specifically challenge the trial court's factual findings on these other two prongs.

wright, 477 U.S. 399, 416-17 (1986) (plurality opinion) (marks omitted)).

Florida enforces this restriction through section 921.137, which was among the statutes *Atkins* identified as evidence of a national consensus. *See Atkins*, 536 U.S. at 315, 317 & n.22. Like most of those statutes, and like most clinical definitions, section 921.137 employs a basic, three-part framework for defining mental retardation, requiring showings of deficient intellectual functioning, poor adaptive functioning, and onset before age 18.

Yet according to Hall, Florida's determination violates *Atkins* because the first part of Florida's definition differs from "established clinical definitions." Pet'r Br. 30. Despite decades of consistently scoring above 70 on IQ tests—a widely recognized threshold for mental retardation, *see, e.g.*, *Atkins*, 536 U.S at 308 n.3 ("'Mild' mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70.")—Hall contends that Florida is constitutionally obligated to apply a five-point error range because professional organizations suggest that approach in the clinical context. But "*Atkins* did *not* establish a national standard for mental retardation," *Allen v. Buss*, 558 F.3d 657, 665 (7th Cir. 2009), and because Florida's standard captures those "so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus," *Atkins*, 556 U.S. at 317, it is faithful to both *Atkins* and the Eighth Amendment.

This case turns on whether *Atkins* truly left any determination to the States or whether, as Hall con-

tends, States are constitutionally bound to vague, constantly evolving—and sometimes contradictory—diagnostic criteria established by organizations committed to expanding *Atkins*'s reach. Nothing in *Atkins* compels the rule Hall advances. "'[T]he Constitution contemplates that in the end [the Court's] own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment,'" *id.* at 312 (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion)), and the Court has never deferred that independent obligation to third parties. Moreover, this Court has consistently refused to require States to adopt any particular clinical judgment and "ha[s] traditionally left to legislators the task of defining terms of a medical nature that have legal significance." *Kansas v. Hendricks*, 521 U.S. 346, 358-59 (1997). And in areas of mental health science—which is constantly evolving—it has recognized that "courts should pay particular deference to reasonable legislative judgments." *Jones v. United States*, 463 U.S. 354, 364 n.13 (1983).

The issue, then, is not whether Florida and any particular organization's latest publication agree precisely on how to define mental retardation. Instead, the issue—a purely legal one—is whether Florida's determination constitutes an "appropriate way[] to enforce the constitutional restriction." *Atkins*, 536 U.S. at 317 (quoting *Ford*, 477 U.S. at 416) (marks omitted). A fair review of Florida's standard demonstrates that it generally conforms to the clinical definitions and, by promoting administrability and accuracy, advances important state interests. Florida's standard thus constitutes an appropriate way to enforce *Atkins*'s constitutional restriction. Adopting Hall's

unprecedented approach, which supplants Florida's legislative judgment with ever-changing clinical criteria, would undermine these important state interests and go beyond any rule that *Atkins* intended.

Finally, Florida's standard resulted in the correct outcome in this case. Hall's conduct in his crimes and extensive evidence from the record of his appeals refutes his claims of intellectual and adaptive deficits. The trial court was justified in determining that Hall is not entitled to relief under *Atkins*.

ARGUMENT

Florida's method for determining whether a capital offender is mentally retarded is fully consistent with the Eighth Amendment. Part I of this Brief demonstrates that, contrary to Hall's arguments, *Atkins* provides the States ample leeway in defining mental retardation. Part II shows that this Court has traditionally deferred to legislative judgments regarding scientific questions and that Hall presents no reason to abandon that approach here. Part III demonstrates that Florida's standard is an appropriate means of enforcing *Atkins*. Part IV concludes, showing that Hall is not within the category of offenders subject to *Atkins*.

I. *ATKINS* LEFT STATES SUBSTANTIAL LEEWAY IN ENFORCING THE CONSTITUTIONAL RESTRICTION.

In exempting the mentally retarded from executions, this Court found that because of their impairments, those persons "do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." *Atkins*, 536 U.S. at 306.

Although a footnote referenced clinical definitions from the American Association on Mental Retardation ("AAMR") and the American Psychiatric Association ("APA"), the Court's focus was not on any particular diagnostic criteria. Instead, the decision turned on a legislative consensus and the Court's "'own judgment [] brought to bear,'" regarding the imposition of death on those with characteristics shared by those generally considered mentally retarded. *Id.* at 312 (quoting *Coker*, 433 U.S. at 597). It then left to the States the task of establishing appropriate definitions and procedures.

A. *Atkins* Does Not Command Strict Adherence to Any Particular Diagnostic Criteria or Definition of Mental Retardation.

Petitioner and his amici start from the flawed premise that *Atkins* required a *clinical* definition of mental retardation. *See, e.g.*, Pet'r Br. 30, 34. But whether a defendant qualifies for exemption under *Atkins* is a legal issue, *see Bobby v. Bies*, 556 U.S. 825, 836 (2009), and "*Atkins* clearly did not hold . . . that states must employ the AAMR or APA definitions of mental retardation, *let alone that they must employ the same underlying clinical analysis that the AAMR and APA use* to determine which patients meet each prong of those organizations' definitions," *Chester v. Thaler*, 666 F.3d 340, 347 (5th Cir. 2011) (emphasis added), *cert. denied*, 133 S. Ct. 525 (2012). In fact, this Court has never required States to adopt a particular medical definition or particular diagnostic criteria, especially where mental health issues are involved. *See infra* Part II.A.

Thus, notwithstanding Hall's contrary arguments, Pet'r Br. 31, the States' authority in enforcing *Atkins* is not limited to procedural determinations. Indeed, after *Atkins*, this Court explicitly stated that *Atkins* "did not provide definitive procedural *or substantive* guides for determining when a person who claims mental retardation 'will be so impaired as to fall [within *Atkins*' compass].'" *Bobby*, 556 U.S. at 831 (emphasis added; other alterations in original) (quoting *Atkins*, 536 U.S. at 317). The Court reiterated that these determinations were left to the States and even observed that "Ohio heeded *Atkins*' call" when its state supreme court established *substantive* criteria for a successful *Atkins* claim. *Id.*; *accord Atkins v. Commonwealth*, 581 S.E.2d 514, 517 (Va. 2003) (on remand, noting that legislature enacted statutory definition in response to *Atkins*).[11]

Likewise, lower courts have uniformly recognized that state leeway extends to substantive definitions of mental retardation. *See, e.g., Hill v. Humphrey*, 662 F.3d 1335, 1339 (11th Cir. 2011) (en banc) ("In *Atkins*, the Supreme Court was careful not to . . . impose rigid definitions of mental retardation."); *Sasser v. Norris*, 553 F.3d 1121, 1125 n.3 (8th Cir. 2009) ("*Atkins* actually does not define mental retardation, leaving the development of the new constitutional restriction to the states."), *abrogated on other grounds by Wood v.*

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[11] Indeed, Hall acknowledged below that, "*[r]ather than adopt a definitive meaning of mental retardation . . .*, [*Atkins*] left to the States the task of developing appropriate ways to enforce the constitutional restriction." Brief of Appellant at 16, No. SC10-1335 (Fla. Dec. 22, 2010) (quoting *Atkins*; marks omitted) (emphasis added).

Milyard, 132 S. Ct. 1826 (2012); *Clark v. Quarterman*, 457 F.3d 441, 445 (5th Cir. 2006) ("[*Atkins*] did not dictate that the approach and the analysis of the State inquiry must track the approach of the AAMR or the APA exactly."); *People v. Jackson*, 199 P.3d 1098, 1110 (Cal. 2009) ("*Atkins* . . . left to the states the tasks of defining mental retardation . . . ."); *Wiley v. State*, 890 So. 2d 892, 894 (Miss. 2004) ("The *Atkins* decision did not define who is or is not mentally retarded . . . .").

Against this weight of authority, Hall relies on *Panetti v. Quarterman*, 551 U.S. 930 (2007), and *Ford v. Wainwright*, 477 U.S. 399 (1986) (plurality opinion), which addressed the categorical prohibition against executing the insane. In Hall's view, *Panetti* held that *Ford* allowed States leeway only in defining *procedures* for implementing the categorical bar. Pet'r Br. 32-33. But this ignores the *Ford* plurality's refusal to impose a definition of insanity on the States, *see* 477 U.S. at 421-22 & n.3 (Powell, J., concurring); *see also Panetti*, 551 U.S. at 957, as well as the *Panetti* Court's own refusal to endorse one test for insanity, *see* 551 U.S. at 960-61; *id.* at 978-79 & n.11 (Thomas, J. dissenting). In the end, Hall confuses *Panetti*'s recognizing some minimum constitutional standard for competence (which it did), with its imposing a nationwide, substantive definition of insanity (which it did not). Likewise, *Atkins* did not set forth a blanket standard tied to the clinical definitions. Indeed, if this Court were to constitutionalize precise and evolving clinical criteria, it would substantially expand the exemption *Atkins* intended, stand at odds with the consensus *Atkins* recognized, and conflict with *Atkins* itself.

B. *Atkins* Relied On a National Consensus That Included Florida and Other States with Varied Definitions of Mental Retardation.

In suggesting that *Atkins* demands state adherence to prevailing clinical criteria, Hall ignores *Atkins*'s reliance on a consensus of state laws, including Florida's law and others like it. According to Hall's logic, the same state statutes that *comprised* a national consensus in *Atkins* *contradicted* that consensus if they deviated from clinical definitions. *Cf. Stripling v. State*, 711 S.E.2d 665, 669 (Ga. 2011) ("Georgia . . . was counted [in *Atkins*] as being *part of* the national consensus regarding the treatment of mentally retarded defendants, and it seems to us entirely illogical that Georgia could have been part of the consensus dictating a categorical rule and yet somehow simultaneously stand in violation of that same rule."). As the Court recognized in *Atkins*, the national consensus reflected a general determination that mentally retarded persons should not be executed; there was never a national consensus regarding precisely who qualified for the protection *Atkins* provided. 536 U.S. at 317 & n.22.

Barely a dozen years before *Atkins*, the Court rejected the proposition that the Eighth Amendment categorically prohibited executing the mentally retarded. *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989). The Court did not simply change its judgment in the interim; instead, "[m]uch ha[d] changed." *Atkins*, 536 U.S. at 314. States across the country had moved away from these executions, and the dramatic shift "provide[d] powerful evidence" that society had come

to view mentally retarded defendants "as categorically less culpable than the average criminal." *Id.* at 316. Summarizing the States' moves, the Court concluded that executions of the mentally retarded had "become truly unusual, and it is fair to say that a national consensus has developed against it." *Id*

As evidence of the national consensus, the Court specifically cited Florida's statute at issue here, which has not substantively changed. *Id.* at 315 n.15. And Florida then, as now, was no outlier. *See infra* Part III.B. Instead, like the other States cited in *Atkins*, Florida relied on a three-part framework that "generally conformed with the clinical definitions." 536 U.S. at 317 n.22. To the extent there was consensus on a definition, it extended only to that essential, three-part framework. There was no agreement, then or now, on any clinical diagnostic criteria—that is, the methods by which that framework is applied.

There was no agreement on whether to impose an IQ cutoff and, if so, what the cutoff should be. Of the eighteen state statutes cited in *Atkins*, *see id.* at 314-15, ten established particular IQ scores as eligibility criteria—most, but not all, used 70.[12] There was no

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[12] *See* ARIZ. REV. STAT. ANN. § 13-703.02(E) (2001) (current version at § 13-753(F)) (70 or below)); ARK. CODE ANN. § 5-4-618(a)(2) (2001) (rebuttable presumption with IQ below 65); KY. REV. STAT. ANN. § 532.130(2) (West 2001) (70 or below); MD. ANN. CODE § 2-202(b)(1)(i) (2001) (repealed 2013) (70 or below); NEB. REV. STAT. § 28-105.01(3) (2001) (2001) (70 or below is "presumptive evidence" of retardation); 2001 N.C. Sess. Laws p. 45 (codified as N.C. GEN. STAT. § 15A-2005(a)(2) (2002)) (70 or below); N.M. STAT.

agreement on how to measure adaptive functioning. *Compare, e.g.*, WASH. REV. CODE § 10.95.030(2)(d) (2001) (defining adaptive functioning by reference to "standards of personal independence and social responsibility"), *with* N.C. GEN. STAT. § 15A-2005(a)(1)(b) (2002) (requiring specific limitations in two or more of eleven specified skill areas). And there was no agreement on the age of onset. *Compare, e.g.*, N.C. GEN. STAT. § 15A-2005(a)(1)(a) (2002) (age 18), *with* MD. ANN. CODE § 2-202(b)(1)(ii) (2001) (age 22). Beyond these differences in the definitions themselves, there was no agreement on how the definitions would be applied, such as how IQ was to be measured.

There was no uniform agreement because, as Petitioner in *Atkins* explained, each State's determination "is inevitably the product of a unique legislative process, involving participation by a wide array of that State's citizens, including prosecutors, defense attorneys, judges, disability advocates, and other groups." Reply Brief of Petitioner, Atkins v. Virginia, No. 00-8452 at 1 (Feb. 12, 2002). It therefore

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ANN. § 31-20A-2.1(A) (2001) (repealed 2009) (70 or below is "presumptive evidence" of mental retardation); S.D. CODIFIED LAWS § 23A-27A-26.2 (2001) (70 or above is "presumptive evidence" of absence of mental retardation); TENN. CODE ANN. § 39-13-203(a)(1) (2001) (70 or below); WASH REV. CODE § 10.95.030(2)(c) (2001) (70 or below). Of the remaining states, five used a statutory definition without a score specified, New York did not have a statutory definition, and Connecticut used a standard requiring a score two standard deviations below the mean. *See* CONN. GEN. STAT. § 1-1g(c) (2001); N.Y. CRIM. PROC. LAW § 400.27(12) (2001).

was no surprise that States' "statutory definitions of mental retardation are not identical." 536 U.S. at 317 n.22.[13]

The consensus *Atkins* described was not about a clinical label or medical definition; the consensus was that some defendants are "so impaired" that they should not be executed. *Id.* at 317. Florida—through the very law Hall challenges—helped form that consensus.

C. *Atkins* Also Relied On the Court's Own Judgment, Which Comported with the State Legislative Determinations.

Although the Court did not limit its analysis to the States' decisions, it found "no reason to disagree with the judgment of the legislatures." *Atkins*, 536 U.S. at 321 (marks omitted); *see also Roper v. Simmons*, 543 U.S. 551, 574-75 (2005). The Court's independent judgment centered on two principal considerations: mentally retarded defendants' diminished culpability, and the inapplicability of traditional penological purposes to their executions. *Atkins*, 536 U.S. at 317. The Court found that the mentally retarded "have diminished capacities to understand and

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[13] In Kansas, one of the states counted within the consensus, an offender's intellectual functioning must have substantially impaired his capacity to appreciate the criminality of his conduct, a standard unlike that of any other state, and one more removed from the clinical definition. *See Atkins*, 536 U.S. at 342-43 & n.2 (Scalia, J., dissenting) (citing KAN. STAT. ANN. § 21-4623(e) (2001) (current version at § 21-6622(h)).

process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Id.* at 318. The Court also found "a serious question" as to whether the recognized justifications for the death penalty apply to the mentally retarded. *Id.* at 319. Their lesser culpability removes the mentally retarded from among "the most deserving of execution." *Id.* And the same deficiencies that make them less morally culpable "make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information." *Id.* at 320; *accord Roper*, 543 U.S. at 563. Finally, the Court found that the mentally retarded "face a special risk of wrongful execution" because of the possibility of their falsely confessing and their inability to assist counsel or demonstrate mitigating facts. *Atkins*, 536 U.S. at 320-21.

As with the national consensus, the *Atkins* Court's independent judgment turned on characteristics shared by a class of individuals for whom a death sentence would be disproportionate. It did not turn on medical labels in describing which offenders were "so impaired as to fall within" this class. *Id.* at 317. The Court did not impose a one-size-fits-all standard to identify these offenders, instead trusting States to make appropriate determinations in implementing *Atkins*. It should not stop now.

II. THE COURT SHOULD NOT ELIMINATE THE STATES' ROLE IN DEVELOPING APPROPRIATE MEANS OF ENFORCING *ATKINS*.

Hall offers no valid reason for the Court to require every State to not only employ the three-part definition (which Florida does), but, in applying the definition, also adopt the full range of diagnostic criteria endorsed by professional organizations. There are compelling reasons why the Court should not.

A. The Court Has Traditionally Deferred to State Legislative Judgment in Defining Mental Conditions with Legal Significance.

The Court's decision in *Atkins* to defer mental retardation definitions to the States was not unusual. Indeed, the Court "ha[s] traditionally left to legislators the task of defining terms of a medical nature that have legal significance." *Kansas v. Hendricks*, 521 U.S. 346, 359 (1997). States have developed varied definitions for mental health concepts, which often "do not fit precisely with the definitions employed by the medical community." *Id.* The Court has noted, for example, that the legal definitions of "insanity" and "competency" "vary substantially from their psychiatric counterparts." *Id.*; *see also id.* ("Legal definitions . . . need not mirror those advanced by the medical profession.") (citing APA, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS at xxiii, xxvii (4th ed. 1994) ["DSM-IV"]).

The Court has never relied exclusively on the medical community to determine constitutional rules. In *Kansas v. Crane*, decided the same term as *Atkins*, the Court considered the proof necessary for sexual of-

fender civil commitment. 534 U.S. 407 (2002). Because "the science of psychiatry, which informs but does not control ultimate legal determinations, is an ever-advancing science, whose distinctions do not seek precisely to mirror those of the law," the Court declined to dictate particular criteria for determinations. *Id.* at 413. Instead, the Court accorded States "considerable leeway in defining the mental abnormalities and personality disorders that make an individual eligible for commitment." *Id.* Although this leeway led to a "less precise constitutional standard" than the parties sought, the Court did not remedy that imprecision by simply deferring legal determinations to the medical community. As the Court noted, the DSM-IV itself recognized the "'imperfect fit between the questions of ultimate concern to the law and the information contained in [the DSM's] clinical diagnosis.'" *Id.* at 413-14 (alterations in original) (quoting DSM-IV at xxxii-xxxiii). Therefore, as it did in *Atkins*, the Court in *Crane* elaborated "generally stated constitutional standards and objectives" rather than precise clinical criteria. *Id.* at 414.

In criminal law, the Court's approach is no different. In *Clark v. Arizona*, the Court recognized the substantial leeway States have in defining insanity. 548 U.S. 735, 749-53 (2006). Citing "significant differences" among State approaches to insanity, the Court found it "clear that no particular formulation has evolved into a baseline for due process, and that the insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice." *Id.* at 749, 752. Leeway was appropriate, again, because of the imperfect fit between science and law. *See id.*; *see also Foucha v. Louisiana*, 504 U.S. 71, 96 (1992)

(Kennedy, J., dissenting) ("It is by now well established that insanity as defined by the criminal law has no direct analog in medicine or science."). The Court also cited the "flux and disagreement" among "medical definitions devised to justify treatment, like legal ones devised to excuse from conventional criminal responsibility." *Clark*, 548 U.S. at 752. A year later, in *Panetti*, the Court again refused to impose a nationwide definition of insanity, despite reaffirming the categorical bar against executing the insane. 551 U.S. at 960-61 ("[W]e do not attempt to set down a rule governing all competency determinations."); *see also supra* at 16.

Clark and *Panetti* exemplify the Court's longstanding reluctance to impose nationwide standards at the intersection of mental capacity and criminal law. *See also Powell v. Texas*, 392 U.S. 514, 536 (1968) (refusing to constitutionalize a concept of *mens rea*). This reluctance should be particularly pronounced in the *Atkins* context, which only highlights the imprecise fit between the fields of medicine and law: The medical definition of mental retardation is constantly evolving, and this area of the law prioritizes stability. The medical field focuses on treatment and assistive service—justifying expansive diagnostic categories—distinct from the law's interest in culpability, punishment, and deterrence. And medicine accommodates varied and conflicting opinions and wide-ranging disagreement about diagnoses, but the law needs settled rules for reasoned and consistent decision-making.

B. Continued Leeway for State Definitions of Mental Retardation Is Particularly Appropriate Because the Diagnostic Criteria Are Constantly Evolving.

The clinical definition of mental retardation—like the attendant labels—is in constant flux. While Florida agrees that the basic three-part framework for mental retardation has been constant—indeed, a version has been in Florida's statutes for 35 years—the diagnostic criteria for applying that definition have not. As the latest version of the DSM acknowledges, "[t]he science of mental disorders continues to evolve." APA, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 5 (5th ed. 2013) ["DSM-5"]; *accord* Douglas Mossman, M.D., Atkins v. Virginia: *A Psychiatric Can of Worms*, 33 N.M. L. REV. 255, 264 (2003) ("'Thoughtful clinicians' recognize the still-primitive nature of psychiatric diagnosis . . . ."). One need only compare various editions of the DSM or AAMR (now called the Association on Intellectual and Developmental Disabilities ("AAIDD")) Manuals to see that the definitions of mental retardation are not immune from change.[14] The AAIDD has published no

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[14] Beyond the DSM and AAIDD, there are numerous organizations that publish their own criteria. The World Health Organization defines mental retardation as "a condition of arrested or incomplete development of the mind, which is especially characterized by impairment of skills manifested during the developmental period, skills which contribute to the overall level of intelligence, *i.e.* cognitive, language, motor, and social abilities." The WHO further classifies individuals by ranges of IQ scores, beginning with an "[a]pproximate IQ range of 50-69." *See* WHO, INT'L STATISTICAL CLASSIFICATION OF DISEASES AND RELATED

fewer than eleven editions of its definitional manual since 1908, and changes along the way have altered the class of persons meeting the definition. For example, the "adaptive behavior" component was added in 1959, decreasing the number of individuals who qualified. Robert L. Hayman, Jr., *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent*, 103 HARV. L. REV. 1201, 1203 n.2 (1990). And notably, until 1973, the AAMR definition of mental retardation required an IQ score just one standard deviation below the mean. *Id.* That definition "overidentified people as having mental retardation, theoretically labeling 16% of the population." AAMR, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 26 (10th ed. 2002) ["AAMR 10th"] (Today, the DSM-5 estimates the prevalence of mental retardation at one percent of the general population. DSM-5 at 38.)

Understandably seeking to minimize this constant change, Hall notes that the definitions' "basic parameters" have been long settled. Pet'r Br. 30. But his challenge is not about the basic parameters, and

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HEALTH PROBLEMS, 10TH REVISION, *available at* http://apps.who.int/classifications/icd10/browse/2010/en#/F70-79 (last visited Jan. 24, 2014). The American Psychological Association separately defines mental retardation using a three-prong definition similar to that of the DSM and AAMR, though the age of onset prong is 22 and the intellectual functioning prong specifies a test score two standard deviations below the mean. *See* Jeffrey Usman, *Capital Punishment, Cultural Competency, and Litigating Intellectual Disability*, 42 U. MEM. L. REV. 855, 876-77 (2012).

there is no dispute that Florida follows these parameters. Hall's challenge is about the precise application of how these parameters are applied—an issue that is anything but settled.

1. *Intellectual Functioning*. Beginning around 1973, clinical diagnoses focused on IQ scores of 70 or below, based on a conclusion that this captured the range of individuals "so limited in their adaptive functioning that they require special services and protection." APA, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 37 (3d ed. 1980) ["DSM-III"]; *accord* AAMR 10th at 21 (summarizing prior definitions and noting that 7th edition, published in 1973, provided an IQ cutoff of two standard deviations below the mean or 70). Although the DSM-III observed that "any measurement is fallible" and that an "IQ score is generally thought to involve an error of measurement," it considered IQ paramount in the diagnosis: "[s]ignificantly subaverage intellectual functioning *is defined as* an IQ of 70 or below on an individually administered IQ test." DSM-III at 36 (emphasis added). Individuals with IQs above 70 had "borderline intellectual functioning," but not mental retardation. *Id.* at 40.

The DSM-IV, introduced in 1994, maintained the focus on an IQ of 70, but with less precision. It modified the criterion to "an IQ of *approximately* 70 or below," DSM-IV at 46 (emphasis added), though it still maintained that "[g]eneral intellectual functioning is defined by" a properly obtained IQ score and, like its predecessor, it still relied exclusively on IQ to categorize severity. *Id.* at 39, 40.

Around the same time, the AAMR introduced the Ninth Edition of its guide, with a definition requiring an IQ "score of approximately 70 *to 75* or below." AAMR 10th at 22 (summarizing standard adopted in 9th edition, published in 1992) (emphasis added). This updated definition "represent[ed] a radical departure from previous definitions," which "expanded the proportion of the general population that [would] be eligible for classification as having mental retardation." Donald L. MacMillan et al., *Conceptual and Psychometric Concerns About the 1992 AAMR Definition of Mental Retardation*, 98 AM. J. ON MENTAL RETARDATION 325, 325, 326 (1993); *see also* BENJAMIN JAMES SADOCK & VIRGINIA ALCOTT SADOCK, KAPLAN AND SADOCK'S SYNOPSIS OF PSYCHIATRY 1138 (10th ed. 2007) ("The AAMR promote[d] designating an IQ of 75, rather than 70, as the beginning level of the mild mental retardation range, thereby enabling many more persons to receive services as mentally retarded."). The DSM declined to follow the AAMR's approach in this regard, though the drafters of the DSM-IV adopted the AAMR's adaptive function domains. *Id.*

In the recently introduced DSM-5, there is still a reference to an IQ of 70, but there is substantially less focus on IQ altogether. The DSM-5 no longer uses IQ to classify severity levels, relying instead on descriptions of adaptive functioning. *See* DSM-5 at 33-36. More significantly, the DSM abandoned decades of defining intellectual functioning by IQ. *Compare* DSM-IV at 39 ("General intellectual functioning *is defined by the [IQ]* obtained by assessment . . . .") (emphasis added) *with* DSM-5 at 33 (requiring "[d]eficits in intellectual functions . . . confirmed by *both* clinical

assessment *and* individualized, standardized intelligence testing") (emphasis added). Thus, while it was long recognized that intellectual functioning was "quantifiable as an [IQ] score" precisely because it was "a phenomenon measured, and thus defined, by intelligence tests," James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 422 (1985), now the DSM-5 seeks to avoid "overemphasiz[ing]" them. APA, *Intellectual Disability Fact Sheet*, *available at* http://www.dsm5.org/Documents/Intellectual%20Disability%20Fact%20Sheet.pdf.

The latest edition of the AAMR (now the AAIDD) manual also offers expanded opportunities for diagnosing mental retardation, emphasizing that use of "approximately" in the IQ score criterion is not only to account for statistical error and "inherent" uncertainty, but also to allow for increased "clinical judgment." AAIDD, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 35 (11th ed. 2010) ["AAIDD 11th"]; *see also id.* ("The intent of this definition [is] not to specify a hard and fast cutoff point/score. . . .").

As these changes demonstrate, the DSM and AAIDD are trending away from the objectivity associated with reliance on IQ tests. By decreasing the significance of these objective data and increasing reliance on amorphous "clinical judgment," the definitions ultimately change the category of persons qualifying for a mental retardation diagnosis. As the chair of the task force that developed the DSM-IV noted in reviewing the DSM-5, "[r]emoving the IQ requirement for [mental retardation] reduces the

reliability and precision of diagnosis and will have forensic implications." Allen Frances, *DSM 5 Writing Mistakes Will Cause Great Confusion*, Psychology Today (June 11, 2013), *available at* http://www.psychologytoday.com/blog/saving-normal/201306/dsm-5-writing-mistakes-will-cause-great-confusion.

2. *Adaptive functioning*. Since its introduction in 1959, the adaptive functioning prong has likewise seen constant change—not only in its evaluation but also in its use. As noted above, the DSM-5 now uses adaptive functioning as the means for differentiating among mental-retardation severity levels—after relying exclusively on IQ for decades. The AAIDD defines the prong as "significant limitations . . . in adaptive behavior as expressed in conceptual, social, and practical adaptive skills." AAIDD 11th at 1. The DSM-5 offers this explanation:

> Deficits in adaptive functioning that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community.

DSM-5 at 33. But there have been variations along the way. "In 1992 the concept of global adaptive behavior was replaced by 10 broad adaptive skill areas and the requirement that 2 or more of the 10 skills be

documented as deficient." AAMR 10th at 25. With some overlap, the Text Revision to the DSM-IV, published in 2000, required a showing of limitations in two of *eleven* areas. APA, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. Text Revision 2000). The AAMR then reversed course and began measuring adaptive deficits in three skill areas instead of ten, and requiring a showing of limitation in only one of those three. AAMR 10th at 73-74. The DSM changed, too—now advancing more general criteria. *Compare* DSM-IV-TR at 41 (requiring "significant limitations in adaptive functioning" in at least two of eleven specific skill areas) *with* DSM-5 at 37 (referring to failures to "meet[] community standards of personal independence and social responsibility" across three domains). At bottom, "the concept" of adaptive functioning "is still being elaborated by experts in the field." Richard J. Bonnie, *The American Psychiatric Association's Resource Document on Mental Retardation and Capital Sentencing: Implementing* Atkins v. Virginia, 28 MENTAL & PHYSICAL DISABILITY L. REP. 11, 12 (2004); *cf. also id.* ("[S]tandardized instruments are in a continuing process of development.").

3. *Age of Onset*. Even the simplest, final criterion—age of onset—is changing. For decades, the DSM required that the symptoms appear before age 18. *See* DSM-III at 37 ("When the clinical picture develops for the first time after the age of 18, the syndrome is a Dementia, not Mental Retardation . . . ."). But the DSM-5 abandons this bright-line age limit, now requiring onset "during the developmental period." DSM-5 at 33. (The AAIDD still maintains an objective age limit. *See* AAIDD 11th at 1.) This latest change—

replacing a bright-line rule with a vague criterion—not only makes mental retardation diagnoses still less precise but also further demonstrates the inability of the psychiatric community to settle on a universal definition of mental retardation.

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When it comes to diagnostic criteria for mental retardation, the only constant is change. In light of the "flux and disagreement," the risks of constitutionalizing changing clinical criteria are obvious. In the context of evolving science, "courts should pay particular deference to reasonable legislative judgments." *Jones v. United States*, 463 U.S. 354, 364 n.13 (1983); *cf. also Baze v. Rees*, 553 U.S. 35, 51 (2008) (plurality opinion) (standard for execution procedures "would threaten to transform courts into boards of inquiry charged with determining 'best practices' for executions, with each ruling supplanted by another round of litigation touting a new and improved methodology . . . [and] would embroil the courts in ongoing scientific controversies beyond their expertise, and would substantially intrude on the role of state legislatures in implementing their execution procedures"). If the Eighth Amendment required courts to apply consensus clinical definitions, the law would change every time the definitions did, making the *Atkins* analysis all the more difficult for courts applying it. But courts would first have the additional burden of determining what the current "consensus" actually is—a task complicated by the competing authorities' unresolved disagreements.

C. States Should Not Be Forced To Agree With Authorities That Themselves Cannot Agree.

It should be no surprise that "statutory definitions of mental retardation are not identical," *Atkins*, 536 U.S. at 317 n.22, because even the prevailing authorities cannot agree on a single definition. Despite faulting Florida for not relying on "the universally accepted clinical definition," Pet'r Br. 3, Hall never identifies this definition, because it does not exist. *See Lynch v. State*, 951 So. 2d 549, 557 (Miss. 2007) (Randolph, J., specially concurring) ("The difficulty in performing this arduous task is accentuated by disagreements among mental health practitioners on the definition of mental retardation."); *cf. Ake v. Oklahoma*, 470 U.S. 68, 81 (1985) ("Psychiatry is not . . . an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness [and] on the appropriate diagnosis to be attached to given behavior and symptoms . . . ."); *cf. also Atkins*, 536 U.S at 308 n.3 (describing the DSM's definition only as "similar" to the AAMR's).

Although Petitioner asserts that differences among competing diagnostic guides do "not differ substantively in any meaningful way," Pet'r Br. 29, one can assume that the AAIDD and APA would not insist on maintaining meaningless differences. Yet it remains unavoidable that the DSM and the AAIDD (and the WHO or the American Psychological Association, *see supra* n.14) *do* maintain their differences and cannot agree on a single definition. *See also* Br. of APA et al. at 8 n.6 (noting that the definitions in the AAIDD and DSM-5 (published by the APA) "differ in

some particulars"); Br. of AAIDD et al. at 9 (acknowledging "minor variations" in the definitions).

Regardless, the differences are not meaningless. For example, the DSM and AAIDD use different terms to describe how adaptive functioning should be diagnosed, Bonnie, *supra*, at 12, and they have yet to reach consensus, *compare id.* ("It should be noted that the AAMR definition reflects the most recent scientific understanding of the concept of adaptive behavior."), *with* MacMillan, *supra*, at 325 (calling the AAMR adaptive skills guidelines "too unreliable for decision-making"); Gilbert S. Macvaugh III & Mark D. Cunningham, Atkins v. Virginia: *Implications and Recommendations for Forensic Practice*, 37 J. PSY. & L. 131, 138-39 (2009) (noting that AAIDD adaptive functioning definition "has been criticized for lacking theoretical grounding and empirical research support" and that some "have questioned whether a new definition, at least in terms of measuring deficits in adaptive behavior, is needed for the purpose of forensic cases").

The AAIDD and the APA cannot even agree on the age-of-onset requirement. As explained above, the DSM long defined the "age of onset" requirement to require symptoms to appear before age 18. The DSM-5 now removes the objective age limit, favoring the nebulous term "developmental period." DSM-5 at 33. The AAIDD's latest definition, though, rejects the change and maintains a strict limit of 18, in part because "extending to the age of 21 . . . would include individuals with other cognitive disabilities." AAIDD 11th at 28; *but see supra* n.14 (American Psychological Association's definition uses age 22).

This only acknowledges the obvious: different criteria yield different outcomes. Those labeled "mentally retarded" under one definition might not be under another definition. *See generally* DSM-IV at 44 (noting estimate of prevalence of mental retardation in population but acknowledging estimates vary depending on definition used in study). This is true whether applying non-identical *clinical* definitions or non-identical *statutory* definitions.

Although the Court should not constitutionalize a single definition or set of clinical criteria in any event, it would be particularly inappropriate to do so when there is no single clinical definition on which the profession can agree. *Cf. Clark v. Arizona*, 548 U.S. 735, 753 (2006) ("There being such fodder for reasonable debate about what the cognate legal and medical tests should be, due process imposes no single canonical formulation of legal insanity."). Nor is it an answer to say that notwithstanding many differences, the AAIDD and APA agree on using a standard error of measurement ("SEM"). Hall bases his challenge on the fact that Florida (and other states) deviate from the clinical criteria. *See* Pet'r Br. 33 ("[B]ecause Florida's definition of mental retardation excludes persons who meet the clinical definition of the disability[, it] violates . . . *Atkins* . . . ."), and he offers no principle to confine any ruling to the SEM. The ruling he seeks would effectively constitutionalize all of the clinical criteria. Under his rule, any State deviating from the clinical criteria, whether related to the SEM or not, would face new legal claims.

D. A Constitutional Rule Requiring Adherence to Prevailing Diagnostic Criteria Promotes Detrimental Incentives in the Medical Community.

One point on which many professional organizations *do* agree is that an *Atkins*-type exemption should extend beyond the mentally retarded. The American Bar Association, the APA (publisher of the DSM), the American Psychological Association, and others, officially propose defining the class of persons exempted under *Atkins* to include those with dementia and other brain injury, which this proposal asserts are "very similar to mental retardation in their impact on intellectual and adaptive functioning." *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 MENTAL & PHYSICAL DISABILITY L. REP. 668, 669 (2006). Although the issue of expanding *Atkins* beyond the mentally retarded is not presented here, these groups' advocacy on this point demonstrates another problem with yielding *Atkins* determinations to them.

One need not disparage the APA, AAIDD, or similar groups, to recognize that their objectives do not include preserving the death penalty. Florida, on the other hand, has important penological goals of punishing criminals and deterring future crimes—goals that medical organizations do not necessarily share. Nor do these organizations necessarily share the State's interest in enforcing all sentences to the extent constitutionally permitted. Instead, "[s]ome organizations to which many mental retardation professionals belong are zealous advocates for the abolishment of the death penalty, whether administered to retarded,

dull, average, bright or genius individuals." *Lynch v. State*, 951 So. 2d 549, 558 (Miss. 2007) (Randolph, J., specially concurring).[15]

There is also evidence suggesting that these organizations—and the diagnostic guides they produce—are not immune from political considerations. "Although psychiatric diagnoses are often revised to reflect new understandings, scientific breakthroughs, or availability of new treatment approaches, sometimes social and political developments play a role." Mossman, *supra*, at 265-66. Lamentably, some have found that "[s]cience is often subordinated to social and political influences in the development and use of the diagnostic categories contained in DSM." HERB KUTCHINS & STUART A. KIRK, MAKING US CRAZY: DSM: THE PSYCHIATRIC BIBLE AND THE CREATION OF MENTAL DISORDERS 16 (1997); *see also* Mossman, *supra*, at 265 & n.105. Further, since the new diagnostic criteria are not tied to research in the

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[15] For example, the AAIDD notes it "has always advocated against the death penalty." *See* AAIDD, *Frequently Asked Questions on Intellectual Disability and the AAIDD Definition* at 5, http://aaidd.org/docs/default-source/sis-docs/aaiddfaqonid_template.pdf?sfvrsn=2. Similarly, the American Psychological Association published a resolution challenging the validity of capital punishment's penological goals. Am. Psychological Ass'n, *The Death Penalty in the United States*, *available at* http://www.apa.org/about/policy/death-penalty.aspx (last visited Jan. 24, 2014).

field, "the claims of science-at-work are difficult to verify or dispute." KUTCHINS & KIRK, *supra*, at 38.[16]

Notably, the DSM's and AAIDD's decreased reliance on objective criteria, including IQ scores, corresponds with calls for increased judicial reliance on the same associations' evolving clinical criteria. In fact, both the DSM and the AAIDD manuals appear to embrace the prospect of increased influence in the courts. While the DSM-IV had cautioned that "the clinical diagnosis of a DSM-IV mental disorder is not sufficient to establish the existence for legal purposes" of a mental disorder or disease, DSM-IV at xxiii, the DSM-5, states that while its purpose is "primarily" to assist clinicians, it also serves "as a reference for the courts and attorneys in assessing the forensic consequences of medical disorders," DSM-5 at 25. The AAIDD even cited *Atkins* in promoting its 10th edition, calling the manual "a timely and critical resource to the states as they strive to come up with a current and fuller definition of mental retardation.'" Mossman, *supra*, at 266 (quoting AAMR Home Page, http://www.aamr.org (no longer available online)).

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[16] The British Psychological Society—"the learned and professional body for psychologists in the United Kingdom," with some 50,000 members—prepared a formal response to the DSM-5, criticizing the DSM-5's reliance on "social norms" and "subjective judgments." The British Psychological Society, *Response to the Am. Psychiatric Ass'n*: DSM-5 Development (June 2011), *available at* http://apps.bps.org.uk/_publicationfiles/consultation-responses/DSM-5%202011%20-%20BPS%20response.pdf.

If the Court determines *Atkins* commands strict adherence to clinical criteria—and whatever subsequent changes they next embrace—the professionals responsible for publishing those criteria would have unavoidable incentives to adopt even more expansive definitions of mental retardation and place even less emphasis on any objective factors, all to the detriment of the law, medical treatment, or both.

None of this is to say that the Court should ignore the APA, the AAIDD, or their proffered diagnostic criteria. These groups undoubtedly contribute to the overall understanding of mental health issues generally and mental retardation specifically. *Cf. Panetti*, 551 U.S. at 962 ("The conclusions of physicians, psychiatrists, and other experts in the field will bear upon the proper analysis."). Legislatures can look to these groups and their opinions when shaping policy determinations, and courts can look to them for information bearing on constitutional determinations. But "overreliance" on the DSM or others "is dangerous." Douglas A. Hass, *Could the American Psychiatric Association Cause You Headaches? The Dangerous Interaction Between the DSM-5 and Employment Law*, 44 LOY. U. CHI. L.J. 683, 693 (2013); *see also id.* (lamenting "the seemingly blind obeisance in legal circles for the DSM result[ing] in practitioners, courts, and judges . . . treating a DSM diagnosis as a proven fact with legal consequences, rather than the hypothesis that it often represents"). As in *Atkins*, the Court can consider the information these groups offer, but the ultimate answer resides elsewhere.

III. FLORIDA'S STANDARD IS AN APPROPRIATE MEANS OF ENFORCING *ATKINS*.

State leeway to enforce *Atkins*'s mandate is not limitless, of course. States cannot evade *Atkins* by crafting definitions of mental retardation that attempt to undo the rule that *Atkins* announced. *Cf.* Pet'r Br. 31 (arguing State could not evade *Atkins* by implementing an IQ cutoff of 50). But far from seeking to evade *Atkins*, Florida's statute—which predated *Atkins*—sought what *Atkins* sought: a death-penalty exemption for those whose cognitive and behavioral deficiencies would make death an inappropriate punishment. And Florida's statute did so in a manner that remains fully consistent with the Eighth Amendment.

A. Florida's Definition Generally Conforms to Clinical Definitions, and Any Deviations Are Justified.

No one disputes that Florida's definition incorporates the same three fundamental concepts that Hall embraces—and that the Court highlighted in *Atkins*. Florida requires a showing of "significantly subaverage general intellectual functioning," and "deficits in adaptive behavior," which manifest before age 18. FLA. STAT. § 921.137(1); *compare Atkins*, 536 U.S. at 318 (noting how clinical definitions require "subaverage intellectual functioning," "significant limitations in adaptive skills," and "manifest[ation] before age 18"); *cf. In re Turner*, 637 F.3d 1200, 1205 (11th Cir. 2011) (per curiam) (finding Florida's definition "substantially identical to that of . . . the clinical definitions in *Atkins*."). And Florida law, like the clinical definitions, requires a finding *on all three prongs*.

See Cherry v. State, 959 So. 2d 702, 711 (Fla. 2007); *see also* DSM-5 at 33 (stating that a patient "must" show all three prongs to satisfy the standard).

Next, Florida did not manufacture its IQ threshold out of thin air. Florida adopted its statutory prohibition after years of deliberation, including testimony from prosecutors, defense attorneys, and community groups, and it incorporated a definition, from a different section of Florida's statutes, that had worked for over twenty years. *See* Senate Staff Analysis at 11. Moreover, a 70 IQ has long been viewed as an appropriate upper limit for mental retardation. As described above, guides have long referred to 70 as an appropriate cutoff, *see supra* Part II.B, and no fewer than nine states referenced 70 in their statutes at the time of *Atkins*, *see supra* n.12. In addition, this Court referenced 70 as a ceiling on several occasions. *E.g.*, *Penry v. Lynaugh*, 492 U.S. 302, 308 n.1 (1989) ("To be classified as mentally retarded, a person generally must have an IQ of 70 or below."); *see also Atkins*, 536 U.S. at 308 n.3; *id.* at 316; *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442 n.9 (1985).

Although States can choose another ceiling, a higher threshold would substantially expand eligibility for diagnosis. "Twice the proportion of people have scores at or below 75 (5.48 percent) than have scores at or below 70 (2.68 percent)." DANIEL J. RECHSLY, ET AL., NAT'L RESEARCH COUNCIL, MENTAL RETARDATION: DETERMINING ELIGIBILITY FOR SOCIAL SECURITY BENEFITS 210-11 (2002); *accord* MacMillan, *supra*, at 327; *see also id.* ("More people fall in the IQ interval 71 to 75 (i.e., 2.80%) than in the entire range previously associated with mental retardation (IQ 70 and below,

i.e., 2.68%). . . ."). In *Atkins*, the Court cited an estimate of between 1 and 3 percent for the population with an IQ in the range of 70 and 75 or lower, 536 U.S. at 309 n.5; requiring an IQ higher than 70 would sweep in far more individuals than the *Atkins* Court anticipated.

Although not entirely clear, Hall does not appear to quarrel with the use of 70 generally. The thrust of his argument is that the Florida definition improperly ignores the SEM and therefore disallows a finding of mental retardation when a defendant's IQ falls above 70, but within approximately five points of 70. This is effectively identical to requiring an IQ threshold of 75, which no State used at the time of *Atkins*, and which would greatly expand the population covered under *Atkins*.

Florida, like other states, has an important interest in ensuring that the constitutionally allowed judgments of its courts and juries are enforced, and it is entitled to limit the coverage of section 921.137 and rule 3.203 to the scope of the *Atkins* consensus. Florida also recognized that the risk of over-diagnosis of mental retardation is particularly pronounced in this setting as capital offenders have every incentive to secure such a diagnosis and the risk of malingering is very real. *See Atkins*, 536 U.S. at 353-54 (Scalia, J., dissenting). Incorporating a bright-line rule and utilizing objective evidence of intellectual deficiency is a valid means of countering this possibility. Further, Florida's omission of an SEM also promotes administrability and consistency, reducing the risk of arbitrary application of the standard. *Cf. Gregg v.*

Georgia, 428 U.S. 153, 188-89 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.).

The fact that consideration of the SEM is accepted in determining eligibility for services or in the educational setting is of no moment. Mental-retardation evaluations in the *Atkins* context differ from evaluations in other contexts. *See Chester v. Thaler*, 666 F.3d 340, 345-46 (5th Cir. 2011) ("[T]he AAMR definition was designed for the purpose of providing social services, not for the purposes of determining whether a person was 'so impaired as to fall within the range of mentally retarded offenders about whom there is national consensus.'") (citing *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004)), *cert. denied*, 133 S. Ct. 525 (2012). In the medical context, for example, an error measurement is consistent with the desirability of providing treatment to a broader group of people. *See* MacMillan, *supra*, at 326; *cf.* AAIDD 11th at 7 ("Labeling someone with the term [mental retardation] should lead to a benefit, such as a profile of needed support.").[17] In the *Atkins* context,

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[17] Hall argues that Florida does not consistently apply its statutory definition in all situations, *see* Pet'r Br. 47, citing a vocational education regulation that expressly relies on the DSM, *see* FLA. ADMIN. CODE. ANN. R. 6A-25.005 (2014). The fact that Florida uses different standards for educational and criminal purposes is unsurprising given the differing considerations in each area. Regardless, Florida has used an IQ cutoff of 70 for other purposes. *See, e.g., id.* R. 65G-4.017(3)(a) (referring to single full-scale IQ score of 70 as grounds for reliance on single test or sub-test in determining eligibility for services); *accord Cherry v. State*, 959 So. 2d 702, 712 (Fla. 2007); *see also* FLA. STAT.

though, error measurements do not serve those same purposes, as Hall's case shows.

First, like most defendants pursuing *Atkins* claims, Hall had multiple test scores over many years. "The pattern of test scores is more important than the score on any given test." ALLEN FRANCES, ESSENTIALS OF PSYCHIATRIC DIAGNOSIS: RESPONDING TO THE CHALLENGE OF DSM-5 at 30 (2013). And "[w]hen there is marked variability, the higher scores are likely to be the more indicative, since there are many reasons why a given score might underestimate a person's intelligence, but no reason why scores should overestimate it." *Id.* at 31. Florida's Rule allows for multiple evaluations, and if Hall believed a statistical error rate prevented any of his tests from reflecting his true score, he could have sought still more testing.

Moreover, accepting an error measurement is inconsistent with another aspect of the *Atkins* inquiry—the burden of proof. Florida requires that a defendant establish *Atkins* eligibility by clear and convincing evidence, a burden Hall does not challenge. A defendant whose best showing on the intellectual functioning prong is that his test score *above* 70 could conceivably (with application of a broad error range) show an IQ *below* 70, has not proven his disability by clear and convincing evidence.[18]

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§ 393.063; *State v. Kinner*, 398 So. 2d 1360 (Fla. 1981) (civil commitment).

[18] In this case, Hall claims his recent IQ score of 72 "is more appropriately expressed in terms of a 95% probability that his true score lies between 68 and 76." Pet'r Br. 40.

Although Florida's standard may not precisely mirror the DSM or the AAMR in all respects, it uses the same "essential criteria," recognized in *Atkins*, Pet'r Br. 34, and it "generally conform[s] to the clinical definitions," *Atkins*, 536 U.S. at 317 n.22. It is well-suited to the legal inquiry that an *Atkins* claim requires, it is consistent with Florida's interest in enforcing constitutional judgments, and it does not violate the Eighth Amendment.

Finally, Florida's standard works in conjunction with *Penry*. *See* Senate Staff Analysis at 4, 11. In proving mitigating factors, defendants can introduce evidence that they satisfy some non-statutory definition of mental retardation, under whatever definition the defense expert employs. *Cf. Wood v. Allen*, 558 U.S. 290, 307 n.3 (2010) (Stevens, J., dissenting) ("Although Wood does not fall within the class of individuals we identified in *Atkins* . . . the reality that the defendant was borderline mentally retarded, might well influence the jury's appraisal of his moral culpability.") (marks, alterations, and citation omitted). Consistent with *Atkins*, Florida's rule operates as a backstop to ensure that those *Atkins* protects will not face the death penalty even if aggravating factors outweigh such mitigating evidence.

Even if there were such a probability, that would be insufficient to prove by clear and convincing evidence that Hall's true IQ were 68 or 69 rather than 71-76. *Cf. Clark*, 457 F.3d at 446 ("The court was not required to find [defendant] to be mentally retarded merely because the low end of [his] confidence band was below 70, just as it would not be required to find that [he] could be executed on the basis that the high end of this band fell above 70.").

B. There Is No National Consensus Regarding the Use of Error Measurements, and Florida's Approach Is Consistent with Other States'.

While Hall suggests Florida's approach is an outlier, he makes no serious effort to identify a consensus against a framework that excludes the use of clinical diagnostic criteria like the SEM within the meaning of *Atkins* or *Roper*. *Cf. Stanford v. Kentucky*, 492 U.S. 361, 373 (1989) (noting the "heavy burden" a petitioner bears to establish a national consensus) (quoting *Gregg*, 428 U.S. at 175). There is no such consensus. As Justice Pariente found, ten states that employ the death penalty have a rule that does not apply the SEM, including Florida. *See* JA133 (collecting statutes). In addition, a number of state courts to consider the SEM have rejected its use. *See Smith v. State*, 71 So. 3d 12, 20 (Ala. Crim. App. 2008) ("If this Court were to adopt a 'margin of error' it would, in essence, be expanding the definition of mentally retarded . . . ."); *Pizzuto v. State*, 202 P.3d 642, 651 (Idaho 2008) (noting that "the legislature did not require that the IQ score be within five points of 70 or below. It required that it be 70 or below" and stating that if error measurement were considered, inference that above-70 IQ score showed defendant's IQ was actually further above cut-off was just as reasonable as inference that it was below); *Bowling v. Commonwealth*, 163 S.W.3d 361, 375 (Ky. 2005) ("The General Assembly chose not to expand the mental retardation ceiling by requiring consideration of [error measurement], but instead, like most other states that quantify the definition, chose a bright-line cutoff ceiling of an IQ of 70, a generally recognized level at which persons are con-

sidered mentally retarded."); *see also State v. Backus*, 287 P.3d 894, 904-05 (Kan. 2012); *Johnson v. Commonwealth*, 591 S.E.2d 47, 59 (Va. 2004), *rev'd sub nom. on other grounds Johnson v. Virginia*, 544 U.S. 901 (2005); *Rankin v. State*, 948 S.W.2d 397, 404 (Ark. 1997). Some States choose otherwise, but "there is no clear consensus among the states regarding the use of the SEM." JA134 (Pariente, J., concurring).

More broadly—and more importantly—there is no consensus among the States to embrace the full range of clinical criteria. States differ as to IQ scores, adaptive functioning, and age of onset, meaning that a defendant conceivably could satisfy one State's definition but not another's. This possibility was apparent before *Atkins*, *see* JA134 (Pariente, J., concurring) (noting that Hall might meet other States' definitions but that "mental retardation, unlike age, is not a fixed, objective test, and therefore these variations appear to have been contemplated [in] *Atkins*"), and it presents no constitutional problem. In fact, it is consistent with other *Atkins* rules and procedures that necessarily might yield different results in different States. States, for example, differ on the burdens of proof for *Atkins* claims, *compare* OKLA. STAT. tit. 21 § 701.10b(F) (preponderance of evidence), *with* ARIZ. REV. STAT. ANN. § 13-753(G) (clear and convincing evidence); *and* GA. CODE ANN. § 17-7-131(c)(3) (beyond reasonable doubt), and on whether a judge or jury makes the determination, *compare* VA. CODE ANN. § 19.2-264.3:1.1 (2013) (jury) *with* IDAHO CODE ANN. § 19-2515A(3) (judge); *see also Schriro v. Smith*, 546 U.S. 6, 6-7 (2005) (per curiam). Nevertheless, none of these legislative choices violates *Atkins*; they were exactly what the Court anticipated when it "le[ft] to the

States the task of developing appropriate ways to enforce the constitutional restriction." 536 U.S. at 317.

C. Hall's Proposed Approach Would Undermine Important State Interests That Depend on Objective, Settled Measures.

The argument Hall advances, if accepted, would undermine important State interests. As noted above, Florida's disallowance of an SEM serves a number of important justifications, each of which Hall's rule would directly undermine. *See supra* Part III.A. But Hall's approach, under which States violate *Atkins* unless they exempt anyone who satisfies modern clinical diagnostic criteria, goes further. Accordingly, Hall's approach would undermine an even greater range of interests.

First, Florida has an interest in finality. If *Atkins*'s scope constitutionally incorporated current clinical criteria, then every update would result in new *Atkins* challenges. Defendants who had failed under earlier definitions would insist they could succeed under the new ones. And by the time one round of hearings and appeals ended, new diagnostic criteria would be ready to start the process again. Future litigation would be endless. *Cf. Baze v. Rees*, 553 U.S. 35, 51, 61 (2008) (plurality opinion) (noting States' legitimate interest in carrying out sentence in a timely manner and citing risk of endless litigation from proposed standard for evaluating execution methods).

Second, Hall's rule would undermine Florida's interest in objective decision-making. Establishing a specific threshold a defendant must satisfy before injecting the more subjective considerations relating to

adaptive functioning provides certainty and minimizes false claims of retardation. Hall's position—and the uncertainty it invites—would maximize those false claims. No IQ score would ever definitively end the inquiry (Hall and his amici conspicuously decline to suggest any true cutoff score) and States would be forced to consider the more subjective adaptive functioning in every case. *See* Br. of APA et al. at 14-17; Br. of AAIDD et al. at 12-14. Hall and his amici fault Florida's standard because, if a defendant fails to establish an IQ under 70, the rule precludes consideration of adaptive functioning. *See* Pet'r Br. 48-49, Br. of AAIDD et al. at 20-22. But this is an argument against any conjunctive standard, including the ones employed by most other states in the *Atkins* consensus as well as the clinical definitions themselves. If a defendant fails to satisfy the intellectual functioning prong, whether it is set at an IQ of 70 or 80—and whether it incorporates the SEM or not—that ends the inquiry, because the Defendant will not satisfy all three prongs as required. The logic of Hall's preferred approach would allow a mental retardation diagnosis at *any* IQ, essentially eviscerating the longstanding intellectual functioning prong by collapsing it into the less objective adaptive functioning prong.

Similarly, Hall's argument that an IQ of 70 is clinically indistinguishable from an IQ of 71, Pet'r Br. 34, invites even greater uncertainty. By that logic, a 75 is indistinguishable from a 76, and so on. Wherever the line is, the clinical definition that "separates persons who receive this diagnosis from individuals whose mental capacities are only well below average is a changing and arbitrary one." Mossman, *supra*, at

265 (note omitted). As a result, "judges, or juries, will often have a hard time deciding on which side of the arbitrary line between mentally retarded and merely 'dull' a defendant falls." *Id.* at 270 (note omitted). But that does not mean there is no line. Whatever the standard—in this context or others—there will be those who fall just above and just below it. Just as someone who kills the day after his eighteenth birthday misses the exemption afforded by *Roper*, *see* 543 U.S. at 574, someone with below average intelligence but not mental retardation misses *Atkins*'s bar.

The answer to the difficulty in diagnosing mental retardation is not to require States to further blur the line or to eliminate it entirely. The better approach is the one suggested by *Atkins* itself. The *Atkins* Court relied on two foundations, a general national consensus, *see supra* Part I.B, and the Court's "own judgment" brought to bear on the question, *supra* Part I.C. *Atkins* therefore requires that courts defer to a State's determination unless its definition falls well outside of the consensus described in *Atkins* or undermines the Court's independent judgment as to the category of persons protected.

Florida's framework satisfies such a standard. First, Florida's definition is unquestionably within *Atkins*'s consensus. *See supra* Part I.B. Second, nothing in Hall's brief shows that Florida's requiring an IQ of 70 rather than 75 undermines the Court's judgment by excluding those who are incapable of premeditation, are unable to be deterred, or are at any greater risk of wrongful execution. *See generally Atkins*, 536 U.S. 317-21; *cf. Panetti*, 551 U.S. at 958-59 (rejecting circuit court's standard for determining

competency because it excluded individuals with characteristics described in *Ford*). Hall has not even attempted such a showing, relying solely on a mismatch between Florida's standard and certain clinical criteria. His case presents no basis for overturning the legislative judgment of Florida and other States.

IV. HALL IS NOT MENTALLY RETARDED.

Finally, although Hall spends much of his brief purportedly establishing his mental retardation, the full picture tells a different story. After considering voluminous testimony and evidence, the trial court made extensive factual findings and rejected Hall's arguments on every prong.

A. The Facts of the Crime Are Flatly Inconsistent with Hall's Belated Claims of Mental Retardation.

In denying Hall's *Atkins* claim, the trial judge placed great weight on the facts of the crimes. And rightfully so. There is no dispute that Karol Hurst's kidnapping and murder was part of a multi-step plan to steal her car, rob a convenience store, avoid use of Ruffin's car in order to evade capture, and avoid leaving witnesses. JA34, 62, 69. Hall's crimes were not the basis of impulse or misunderstanding but followed a premeditated plan. *Cf. Atkins*, 536 U.S. at 318; *see also id.* at 319-20 (noting that the "cold calculus" that precedes premeditated, deliberated murder is "at the opposite end of the spectrum from behavior of mentally retarded offenders"). Indeed, the resentencing court found that Hall qualified for Florida's "cold, calculated, and premeditated" aggravating factor. JA33-34. Even the shooting of Deputy Coburn was based on

Hall's logical, thought-out conclusion that if Coburn discovered that Hall, a convicted felon on parole, had a gun, Hall would return to prison. *See* 1993 ROA v.9 R.1509-10. This displays logical reasoning, *cf. Atkins*, 536 U.S. at 318, as well as an ability to process information regarding a potential penalty "and, as a result, control [his] conduct," *cf. id.* at 320. Hall's efforts to cover up the crimes and evade capture likewise demonstrate planning, reasoning, and an ability to be deterred. *Cf. Chester*, 666 F.3d at 350 ("[W]e wish to note a few striking facts from the record that highlight the deficiency of petitioner's claim [regarding] deficiencies in adaptive behavior[:] Petitioner carefully cased the house of his victims, located the telephone box, cut the telephone wires, entered through an unlocked door (presumably to avoid the noise that would accompany breaking in), disguised himself in a ski mask, and raped/sodomized the two women inside using all the precautions one might expect to see from a clever criminal. After murdering the girls' uncle, Petitioner fired his gun into the locked doors of the victim's car, apparently reasoning that shooting a lock would break it and cause it to fail. This was hardly the work of a person with diminished mental capacity; it was problem-solving in response to a crisis.").

The facts of the crime directly undermine Hall's arguments regarding adaptive functioning. Hall relies on the testimony of experts who examined him a decade or more after the crime. *See* Pet'r Br. 51-52. But as Judge Tombrink noted in 1991, the testimony was such "professional overkill" that if "believed and taken to its logical conclusion, [Hall] is practically a vegetable." JA42. As Judge Tombrink concluded—and as

Hall's own expert, Dr. Krop, appears to have believed, *see supra* n.7—this evidence cannot square with the facts of the crime.[19]

B. The Totality of Hall's Medical Evidence Fails To Show That His Mental State Is Attributable to Mental Retardation.

Setting aside the facts of Hall's crimes, the medical evidence demonstrates that Hall is not mentally retarded, even under the clinical definitions he proposes.

The full record of Hall's intelligence testing demonstrates that, until just before his resentencing, Hall consistently tested above the consensus range for mental retardation. *See supra* at 8. He achieved IQ scores of 76, 79, 80, 60, 73, 74, 69, 71, and 72, scoring his highest in the years surrounding the murder and scoring outside the range until just before he made his first claim of mental retardation. At every point before 1988, including on a test administered less than a year after the murders, Hall consistently scored above

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[19] Hall has presented his own narrative of the events of the crime, sponsoring testimony at his resentencing of a supposed confession by Ruffin. Ruffin reportedly admitted that he alone shot Hurst. 1993 ROA v.9 R.1605-07. However, Ruffin also reportedly said that before the shooting "Freddie told him, you got to prove yourself [to] be a man," and that Hall handed Ruffin the gun, which Hall had stolen, that Ruffin used to kill Hurst. *Id.* v.11 R.1874-75. Rather than demonstrating that Hall was a "follower[] rather than [a] leader[]," *Atkins*, 536 U.S. at 318, this shows precisely the opposite. Finally, even in this version, Hall fired the shot that killed Deputy Coburn. *Id.* v.9 R.1611.

the consensus IQ threshold *with or without the SEM.*[20]

Hall now tries to obscure these facts. First, Hall claims that the Court should disregard his above-range IQ scores from 1968 and 1979 because he achieved these scores on Beta and Kent tests, which Hall claims are unreliable and not acceptable under Florida law. Pet'r Br. 12 n.5. Aside from incorrectly describing Florida law,[21] this argument ignores the fact that Hall has consistently relied on his Beta Test performance *from 1988*, including in briefing to this Court, when that evidence has suited him. *See, e.g.*, Pet. for Cert. at 4 (quoting JA73 (Barkett, J., dissenting) ("The testimony reflects that Hall has an IQ of 60 . . . .")); *see also* Pet. for Cert., 01-6939, at 1 ("Freddie Lee Hall is mentally retarded with an IQ of 60."). Moreover, the argument ignores the fact that the 1968 and 1979 scores are consistent with Hall's 1986 performance on the Wechsler Adult Intelligence Scale, which Hall describes as "the 'gold standard' in IQ testing." Pet'r Br. 12 n.5.[22] The record of Hall's

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[20] Hall makes much of the fact that school teachers, at various points, wrote that he was slow or mentally retarded. *See, e.g.*, Pet'r Br. 7, 50. There is no record evidence that any of his teachers were qualified to make such a diagnosis. Regardless, the IQ threshold until 1973 was only one standard deviation from the mean—a far more lenient standard than even Hall advocates here. *See supra* Part II.B.

[21] *See* Fla. R. Crim. P. 3.203(b) (specifying that court is to consider "all other evidence" of mental retardation).

[22] Hall attempts to downplay *that* performance by noting it was "administered by a graduate student." Pet'r Br.

intelligence testing is simply inconsistent with mental retardation.

Hall fares even worse on the other two prongs. As Judge Tombrink held, the adaptive functioning prong required that Hall make a showing of deficient adaptive functioning concurrent with his intelligence testing—not evidence from thirty years earlier. Hall makes no challenge to this ruling and, as his trial counsel and expert acknowledged, they prepared no evidence at all of concurrent adaptive functioning.[23] JA111; *see also supra* n.10. As to the third prong, requiring onset of mental retardation before age 18, the court held that while Hall presented evidence of adap-

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18 & n.10; *see also id.* at 12. Again, Hall's argument is at odds with his earlier positions: Hall did not hesitate to rely on the conclusions of the "graduate student," Marilyn Feldman, when he viewed it to advance his cause. *See, e.g.*, JA19. Regardless, Hall's own expert, Dr. Dorothy Lewis, testified that Feldman was qualified to administer the test and had experience doing so. 1993 ROA Supp. v.1 Tr.45-46.

[23] Further, much of the evidence Hall did present on adaptive functioning was inconsistent with other parts of the record. For example, Hall's brother testified that Hall could not drive, JA202, yet it is undisputed that Hall drove Hurst from the abduction site to the murder site, and that he drove in the high-speed chase following Deputy Coburn's murder. Hall's brothers testified that Hall was illiterate and could not read or write, JA199, 212, yet the record contains items such as a letter that Hall wrote to his girlfriend shortly after the murder, 1981 ROA v.1 R.117-19, and his handwritten statement to police, *id.* at 102-05; *see also id.* at 128 (report of investigating officer noting that Hall wrote out the statement).

tive deficits prior to age 18, none of his witnesses testified regarding his intelligence before age 18. JA113. Indeed, the only quantifiable evidence on this point—Hall's 76 IQ score at age 23—supports a conclusion that Hall did not have sufficient intellectual deficits at age 18. The burden of proof was on Hall to present sufficient evidence on both additional prongs, and he failed.

Hall appears to concede that the trial court's grant of the State's motion in limine did not preclude him from presenting any evidence as to these prongs, *see* Pet'r Br. 19, 20, and he makes no real argument that the court's decision on these prongs was incorrect. Indeed, the relief Hall requests is that this Court "direct the Florida courts to consider" the very evidence of adaptive deficits that the circuit court already heard and rejected. Pet'r Br. 51-52; *see also supra* n.10.

Finally, much of the evidence—and much of Hall's argument—points to problems *other than* mental retardation, such as his difficult childhood, abusive mother, and poverty. Pet'r Br. 7, 50. Hall presented this at the sentencing stage as evidence of mitigating factors, but it does not establish mental retardation. Similarly, Hall and his experts suggest organic brain damage and mental illness, *e.g.*, JA334, but the issue here is mental retardation.[24]

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[24] These conditions could well have affected Hall's IQ testing. *See generally* FRANCES, *supra*, at 30 ("IQ scores below 70 can be compatible with no diagnosis if there are no problems in adaptive functioning and/or if the person

Not every circumstance or condition, however sympathetic, supports an *Atkins* claim. Hall had every opportunity to prove any and all mitigating factors, and neither the resentencing jury nor the court overlooked Hall's upbringing or other issues. But ultimately, the courts found this insufficient to overcome the aggravating factors, and that issue is not before this Court. And as to the issue that *is* before the Court—whether Hall is mentally retarded—the entirety of the record shows that he is not.

Accordingly, Hall presents no basis to overturn the punishment that every jury and judge he has appeared before has found he deserves for murdering Karol Hurst.

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was . . . suffering from another mental disorder during the time of testing.").

CONCLUSION

This Court should affirm the decision of the Florida Supreme Court.

Respectfully submitted,

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REPLY BRIEF

No. 12-10882

IN THE

Supreme Court of the United States

FREDDIE LEE HALL,

Petitioner,

v.

FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

REPLY BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

No. 12-10882

FREDDIE LEE HALL,

Petitioner,

v.

FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

REPLY BRIEF FOR PETITIONER

Florida does not dispute—because it cannot—that its refusal to take account of the standard error of measurement inherent in IQ testing violates long-established and universally accepted statistical principles. Nor does it dispute that its arbitrary refusal to consider the SEM will result in the execution of persons who have mental retardation under the clinical definition this Court relied on in *Atkins* v. *Virginia*, 536 U.S. 304 (2002).

Rather, Florida takes aim at *Atkins* itself, contending that *Atkins* permits States to define mental retardation and thus decide which persons are sufficiently impaired that their execution violates the Eighth Amendment. That position empties *Atkins* of meaning. *Atkins* held that the Eighth Amendment categorically

bars the execution of any person with mental retardation. Florida cannot unilaterally narrow the definition of mental retardation by ignoring *Atkins* itself and disregarding the universal scientific consensus governing the interpretation of IQ test scores.

That is all this Court needs to decide this case. The rest—most of Florida's brief—is beside the point. Florida uses many pages attempting to discredit the professional organizations with expertise in mental retardation, and indeed to discredit psychiatry itself, arguing that the clinical definition of mental retardation is continually changing and expanding. Florida's claims of constant change are untrue, but also irrelevant. As Florida does not dispute, the SEM is and has long been recognized as an inherent property of IQ test scores. And the only question before this Court is whether Florida may disregard the SEM.

Florida's remaining arguments are equally irrelevant to that central question. Florida's interests in finality and administrability—which, in any event, are not harmed by taking the SEM into account—cannot outweigh *Atkins*' constitutional guarantee. And while Florida is in a distinct and small minority in setting a rigid IQ test score cutoff of 70 and refusing to consider the SEM, the precise number of States that share Florida's approach is immaterial. *Atkins* recognized the relevant national consensus, and the question here is only whether Florida's rule complies with *Atkins*. It does not.

Finally, while this Court need not make the ultimate determination whether Hall has mental retardation, there can be no serious question that he does. Every psychiatrist and psychologist who conducted a complete evaluation of Hall concluded he has mental

retardation. Florida presented no contrary testimony below. Florida argues here that Hall cannot have mental retardation because of his IQ scores—known to the experts who evaluated him—and because he committed a multi-step capital crime. These arguments merely highlight Florida's determination to evade *Atkins'* holding. This Court should not permit it to do so.

ARGUMENT

I. FLORIDA'S REJECTION OF THE SEM VIOLATES *ATKINS'* CATEGORICAL BAR ON EXECUTING PERSONS WITH MENTAL RETARDATION

A. *Atkins* Does Not Permit States To Redefine Mental Retardation

Florida rests its entire argument on the premise that *Atkins* left it to States to define mental retardation and thus determine the scope of the substantive constitutional right *Atkins* recognized. That is not and could not be true. This Court has never ceded to States the authority to define the federal constitutional limits on their power. *Atkins* permitted States to craft appropriate procedures "'to enforce the constitutional restriction,'" 536 U.S. at 317, not to reshape it.

Panetti v. *Quarterman*, 551 U.S. 930, 957 (2007), confirms the point, holding that States cannot adopt definitions of insanity that undermine the "'substantive restriction on the State's power to take the life of an insane prisoner'" recognized in *Ford* v. *Wainwright*, 477 U.S. 399, 405 (1986). Pet. Br. 31-33. While Florida contends (at 16) that *Panetti* recognized only that States cannot depart from the "minimum constitutional standard," that is exactly what is at issue here. This Court does not need to "constitutionalize precise and evolving clinical criteria" for mental retardation (*id.*) to recog-

nize that Florida's refusal to acknowledge the universally accepted understanding of IQ scores violates the minimum constitutional standard set out in *Atkins*.[1]

Florida insists (at 14) that *Atkins* did not "require[] a *clinical* definition of mental retardation" and argues (at 22-24) that "the medical community" should not "determine constitutional rules." That argument is fundamentally flawed. Mental retardation is a *clinical* condition, unlike insanity or incompetence, which are legal, not scientific, concepts. *See* Davison et al., *Abnormal Psychology* 614 (9th ed. 2004) ("Insanity is a legal concept, not a psychiatric or psychological concept."); Bonnie, *The American Psychiatric Association's Resource Document on Mental Retardation and Capital Sentencing*, 28 Mental & Physical Disability L. Rep. 11, 11 (2004) (contrasting mental retardation, a "clinical diagnosis," with "traditional legal concept[s], such as competence or responsibility"). Unsurprisingly, *Atkins* cited the "similar" clinical definitions of mental retardation established by the leading scientific and professional organizations, 536 U.S. at 308 n.3, and noted that those States that had prohibited execution of persons with mental retardation had adopted definitions that "generally conform to the clinical definitions," *id.* at 317 n.22. In short, the Court properly re-

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[1] *Bobby* v. *Bies*, 556 U.S. 825 (2009), is not to the contrary. *See* Resp. Br. 14-15. *Bobby* simply held that a pre-*Atkins* finding of mental retardation as a mitigating factor does not preclude the State from contesting mental retardation in a post-*Atkins* hearing. 556 U.S. at 833-837. While it notes in passing that *Atkins* "did not provide definitive procedural or substantive guides for determining when a person" has mental retardation, *id.* at 831, it nowhere suggests that States have the authority to define mental retardation for themselves, contrary to accepted scientific principles, in a way that undermines *Atkins*' core guarantee.

lied on the clinical definition of mental retardation to establish the constitutional bar on execution of persons with the clinical condition.

At bottom, Florida simply refuses to accept *Atkins*' holding. Florida contends (at 21) that this Court rejected a "one-size-fits-all standard" turning on "medical labels" for determining when the death penalty is disproportionate. That is, Florida argues that *Atkins* permits States to determine that some defendants who have mental retardation as a clinical matter are nonetheless eligible for the death penalty. Precisely the opposite is true.

Atkins explained that "*clinical definitions* of mental retardation require [both] subaverage intellectual functioning [and] significant limitations in adaptive skills." 536 U.S. at 318 (emphasis added). And it reasoned that, "*by definition*," persons with mental retardation "have diminished capacities" that render them less culpable, and more susceptible to wrongful execution, than persons without mental retardation. *Id.* (emphasis added). Furthermore, *Atkins* repudiated the notion that such persons could be sufficiently protected through an individualized determination of their culpability. *Id.* at 321. Instead, the Court "categorically excluded from execution" persons who fit the clinical definition of mental retardation. *Id.* at 318; *see Miller* v. *Alabama*, 132 S. Ct. 2455, 2463 (2012) (*Atkins* imposed a "categorical ban[]"). Florida's attempts to relitigate that judgment should be rejected.

B. Florida's Refusal To Acknowledge The SEM Will Result In The Execution Of Persons Protected By *Atkins*

Florida does not dispute—and thus concedes—that the SEM is a decades-old, universally recognized, and

inherent aspect of IQ test scores, and that clinicians routinely take it into account when diagnosing mental retardation. Yet Florida argues it should be entitled to disregard the SEM because, it claims, the overall definition of mental retardation is constantly changing. That is a non sequitur. The SEM's role in diagnosing mental retardation has not changed. And the sole question presented in this case is whether Florida can refuse to acknowledge the SEM. In any event, Florida's claims of "constant change" (*e.g.*, at 26) in other aspects of the definition are wildly overblown. Nor do Florida's other attempted justifications for ignoring the SEM withstand scrutiny. Florida's arbitrary refusal to acknowledge the SEM will result in the execution of people with mental retardation, contrary to *Atkins*.

1. Consideration of the SEM in IQ testing has been required for decades

The SEM is considered "one of the most important concepts in measurement theory." Furr & Bacharach, *Psychometrics* 118 (2d ed. 2014); *see generally* Traub, *Classical Test Theory in Historical Perspective*, Educational Measurement: Issues & Practice 8-13 (1997). It is a statistical fact, arising whenever an instrument with less than perfect reliability is used in measurement. Furr & Bacharach 118-119. Indeed, Florida courts themselves have recognized that the SEM "'is a universally accepted given fact and, as such, should logically be considered'" in determining whether a defendant has mental retardation. *Cherry* v. *State*, 959 So. 2d 702, 712 (Fla. 2007).

Consideration of the SEM has been required since the beginning of modern intelligence testing. The original Wechsler-Bellevue Intelligence Scale, published in the 1930s, reported the test's SEM. Wechsler, *The*

Measurement of Adult Intelligence 133 (3d ed. 1944). As Wechsler explained, "[t]he reliability of a scale is the consistency with which it measures the abilities it sets out to test." *Id.* That consistency—the probability that an obtained IQ score will reflect a person's "true" score—can be expressed through the test's "standard error of measurement." *Id.*; *see also* McNemar, *Psychological Statistics* 130 (1949). As Hall's brief explained (at 40), the SEM means that an obtained IQ test score of 70 more accurately represents 95% confidence that the person's "true" score is between 65 and 75.

Definitions of mental retardation have long incorporated consideration of the SEM. The 1973 AAIDD (then the AAMD) manual discussed measurement error explicitly. AAMD, *Manual on Terminology and Classification in Mental Retardation* x (1973). The 1983 manual also explained that IQ tests are necessarily subject to measurement error. AAMD, *Classification in Mental Retardation* 56 (1983) ("1983 *AAIDD Manual*"). While defining "[s]ignificantly subaverage" intellectual functioning as "IQ of 70 or below," the 1983 manual expressly stated that the "upper limit" of 70 was "intended as a guideline," which "could be extended upward through IQ 75 or more." *Id.* 11. Similarly, the 1992 manual—cited in *Atkins*, 536 U.S. at 308 n.3—defined "significantly subaverage intellectual functioning" as "an IQ standard score of approximately 70 to 75 or below." AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* 5 (9th ed. 1992).

Accordingly, although Florida asserts (at 28) that the 1992 manual's use of an upper limit of "70 to 75" represented a "'radical departure'" from prior practice, that is not so. In fact, the 2002 manual responded specifically to the source Florida cites (*id.*) and explained that the 1992 revision was "intended to provide in-

creased clarity, but *not* to change the cutoff." AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* 28 (10th ed. 2002) ("2002 *AAIDD Manual*"). AAIDD's definition of subaverage intellectual functioning, and its acknowledgment of measurement error, have not changed in any meaningful way since the organization adopted a two-standard-deviation approach over forty years ago.

The same is true for the *DSM*.[2] In 1980, the *DSM-III* explained that "[s]ince any measurement is fallible, an IQ score is generally thought to involve an error of measurement of approximately five points; hence, an IQ of 70 is considered to represent a band or zone of 65 to 75," and that persons with obtained IQ scores above 70 could thus be diagnosed with mental retardation if other evidence warranted it. *DSM-III* 36-37. Subsequent editions followed suit. *See DSM-III-R* 28 (1987); *DSM-IV* 39-40 (1994); *DSM-IV-TR* 41-42 (2000); *DSM-5* at 37 (2013). Florida is thus wrong to claim that the category of persons who satisfy the intellectual functioning prong has changed or expanded in recent memory.

Florida also argues (at 29) that there has been a shift from "reliance on IQ tests" to reliance on "'clinical judgment.'" While that point has little relevance here, since the SEM is a basic statistical principle that does

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[2] Florida argues (at 33-35)—though not with regard to the SEM—that the AAIDD manuals and the *DSM* diverge in significant respects. That is wrong. Indeed, the APA has long consciously followed the AAIDD's lead in defining mental retardation. *See, e.g.*, APA, *Diagnostic and Statistical Manual of Mental Disorders* 36 n.* (3d ed. 1980) ("*DSM-III*"); Tassé, *Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases*, 16 Applied Neuropsychology 114, 115 (2009).

not involve "clinical judgment," it is also incorrect. Indeed, the very first edition of the *DSM* to discuss mental retardation, in 1968, noted that diagnosis required clinical judgment. *DSM-II* 14 (1968) ("[T]he intelligence quotient should not be the only criterion used in making a diagnosis," but "should serve only to help in making a clinical judgment."). Similarly, the AAIDD has long recognized that "determination of the presence or absence of mental retardation requires sound clinical judgment." 1983 *AAIDD Manual* 4.

Although it is likewise irrelevant to the question presented here, Florida is also wrong in arguing (at 30-31) that evaluation of adaptive behavior has significantly changed. The core concept of adaptive behavior—namely, "the effectiveness with which [an] individual copes with the nature and social demands of his environment"—has not meaningfully changed since its introduction half a century ago. AAMD, *A Manual on Terminology and Classification in Mental Retardation* 61 (1959). To be sure, clinical approaches to measuring deficits in adaptive behavior have evolved in response to empirical data and have become more reliable over time. *E.g.*, 2002 *AAIDD Manual* 76, 83. In particular, the 2002 *AAIDD Manual* refocused the assessment of adaptive behavior from ten skill areas AAIDD had previously identified to three broad domains (conceptual, social, and practical), which it continues to use today. *Id.* 81-82 & tbl. 5.2. But it also stressed that each of the previous skill areas remained "conceptually linked" to one or more domains. *Id.* 81.

2. Florida's remaining arguments for disregarding the SEM are unavailing

Florida's other arguments as to why it should be permitted to disregard the SEM are no more persua-

sive. Florida asserts (at 42) that considering a test's SEM is "effectively identical to requiring an IQ threshold of 75" and thus expanding the population eligible for a diagnosis of mental retardation. That fundamentally misunderstands the SEM, which ensures that people with a true level of intellectual functioning two or more standard deviations below the mean—*i.e.*, 70 or below, not 75 or below—do not have mental retardation wrongly ruled out because of measurement error.

Florida also argues (at 44) that consideration of the SEM is unnecessary when a person has multiple test scores because "'higher scores are likely to be the more indicative.'" That is simply false. Testing error can lead to overestimating a person's true IQ just as easily as underestimating it. An examinee may make lucky guesses or benefit from scoring error by the test administrator. Kaufman, *IQ Testing 101* at 138-140 (2009). Even the source Florida cites recognizes that "IQ scores above 70 ... (plus 5 points)" can be consistent with mental retardation "if there are also clear problems in adaptive functioning." Frances, *Essentials of Psychiatric Diagnosis* 30 (2013); *see id.* (recognizing measurement error and noting that IQ scores "ha[ve] to be interpreted within the context of the entire clinical situation").[3]

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[3] Even where there are multiple test scores, each individual score must be assessed using the SEM. *See* Schneider, *Principles and Assessment of Aptitude and Achievement, in The Oxford Handbook of Child Psychological Assessment* 286, 289-291 (Saklofske et al. eds., 2013). The analysis of multiple IQ test scores is more complicated than taking the highest score or looking at a pattern of scores to form a gestalt judgment about "true" IQ. *Id.* Doing so, or even using an average, may systematically overestimate a person's true intellectual functioning relative to his or her peers. *Id.* 290, 318.

In addition, Florida contends (at 44 & n.18) that the SEM is "inconsistent" with the clear and convincing burden of proof. Amicus Criminal Justice Legal Foundation (CJLF) makes the similar argument (at 15) that "a test score above 70 establishes a prima facie case" that the defendant does not have substandard intellectual functioning, which the State may bar the defendant from rebutting.

This is merely another way of arguing that the State should be permitted to narrow the protected category *Atkins* identified. Perhaps the State may require a defendant to show *mental retardation* by clear and convincing evidence. But it is not scientifically justifiable to rule out a diagnosis of mental retardation when a person's obtained IQ score falls within the SEM of 70. Pet. Br. 35-41. A defendant with an obtained IQ score of 75 may have more difficulty demonstrating that he satisfies all three prongs of the definition, and thus carrying his burden of proof, than a defendant with an obtained IQ score of 65. But requiring an obtained IQ test score of 70 or below before considering evidence of adaptive behavior will unquestionably exclude defendants who have mental retardation from *Atkins*' protection. *See, e.g.*, *DSM-5* at 37 (explaining that "a person with an IQ score above 70 may have such severe adaptive behavior problems" as to warrant a diagnosis of mental retardation). Taking CJLF's statistics (which it states (at 14) are not "strictly correct") at face value, more than 32% of defendants who score a 71 on the WAIS-IV will have a "true" IQ score below 70. In Florida, none of those individuals even has the op-

portunity to prove mental retardation by showing evidence of adaptive deficits.[4]

Finally, Florida argues (at 48) that considering the SEM would "undermine important State interests" in finality and objectivity and would result in increased reliance on "more subjective considerations." Those concerns could not justify refusal to comply with *Atkins* even if they were valid, but in fact Florida's scare tactics are baseless.

Taking the SEM into account does not mean that diagnosis of mental retardation is "more subjective" (Resp. Br. 48), still less that there could be "a mental retardation diagnosis at *any* IQ" (*id.* 49). It means only that defendants with an obtained IQ test score of 75 or less on a properly administered and appropriately normed test—that is, defendants who are within the SEM of 70—have the opportunity to prove mental retardation. Such defendants would still have to demonstrate that they satisfy all three prongs of the definition: significantly subaverage intellectual functioning, deficits in adaptive behavior, and onset in childhood. As the clinical consensus demonstrates, that approach is far more accurate than Florida's, which achieves a false precision at the cost of creating an unacceptable

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[4] The premise of CJLF's chart—that obtained IQ scores can be viewed in isolation—is wrong, but the chart is flawed in other respects. It misleadingly suggests that the probabilities associated with an obtained IQ score are not symmetrical. In fact, under CJLF's methodology, a person with an obtained IQ score of 71 has an equal chance of having a true IQ above or below 71. And the chart shows only probabilities calculated using the SEM of the WAIS-IV (CJLF Br. 15); using the higher SEMs from earlier tests would produce different probabilities.

risk of execution for defendants with mental retardation—precisely the risk *Atkins* intended to eliminate.[5]

Florida concedes (at 40), as it must, that "States cannot evade *Atkins* by crafting definitions of mental retardation that attempt to undo the rule that *Atkins* announced." But that is what Florida has done here.

C. Florida's Approach Finds No Support In The National Consensus Recognized In *Atkins*

Florida insists (at 17-20, 46-48) that it has leeway to reject the SEM because the national consensus on which *Atkins* relied was evidenced in part by state laws—including Florida's—that required IQ scores of 70 or below. Similarly, it contends that there is currently no national consensus regarding use of the SEM. Both arguments fail.

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[5] Florida's claim (at 40) that its approach correctly identifies "those whose cognitive and behavioral deficiencies would make death an inappropriate punishment" should be viewed with skepticism, given that, to petitioner's knowledge, the Florida Supreme Court has never ruled in a defendant's favor on an *Atkins* claim, even when the defendant has obtained IQ scores of 70 or below. *See, e.g.*, *Diaz* v. *State*, 2013 WL 6170645, at *22 (Fla. Nov. 21, 2013) (holding intellectual functioning prong not met despite IQ score of 57 "due to concerns about the administration and scoring of the IQ test"); *Dufour* v. *State*, 69 So. 3d 235, 246-248 (Fla. 2011) (denying relief to defendant with IQ scores of 62, 67, and 74 based on adaptive behavior); *Jones* v. *State*, 966 So. 2d 319, 329 (Fla. 2007) (IQ scores of 67, 70, 72, 72, and 75 "d[o] not indicate 'significantly subaverage general intellectual functioning'"); *Burns* v. *State*, 944 So. 2d 234, 247 (Fla. 2006) (IQ test scores of 69 and 74 did not meet intellectual functioning requirement); *Rodgers* v. *State*, 948 So. 2d 655, 667 (Fla. 2006) (denying relief where defendant "fell within the mild mental retardation range" for intellectual functioning but did not establish other two prongs).

1. State law at the time of *Atkins* does not support Florida

Florida notes (at 18) that its own statute was among those *Atkins* cited as evidence of consensus and claims that its law "has not substantively changed." On its face, however, Florida's statute conforms to the clinical definition, requiring an IQ score "two or more standard deviations from the mean," without precluding consideration of the SEM. Fla. Stat. §921.137(1). The accompanying legislative staff analysis explained that "two or more standard deviations" is "*approximately* a 70 IQ, although it can be extended *up to 75*," and the law itself "does not contain a set IQ level." Fla. S. Staff Analysis, CS/SB 238, at 11 (Feb. 14, 2001) (emphases added). It was not until the Florida Supreme Court decided *Cherry*—five years after *Atkins*—that Florida adopted a rigid IQ test score cutoff inconsistent with basic statistical principles. Pet. Br. 16-18, 43-44.

Nor is Florida aided by the other state laws cited in *Atkins*—laws Florida does not accurately describe. Florida claims (at 18 & n.12) that "[o]f the eighteen state statutes cited in *Atkins*, ten established particular IQ scores as eligibility criteria" and nine "used 70." But only one of those ten States—Kentucky—has, like Florida, rejected consideration of the SEM (in a post-*Atkins* decision). *Bowling* v. *Commonwealth*, 163 S.W.3d 361, 375 (Ky. 2005). Of the nine other States, four used an IQ score only to trigger a presumption, not to foreclose a defendant from establishing mental retardation.[6] And none of the other States with statutes

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[6] Ark. Code Ann. §5-4-618(a)(2); Neb. Rev. Stat. §28-105.01(3); N.M. Stat. Ann. §31-20A-2.1(A) (repealed for new offenses in 2009); S.D. Codified Laws §23A-27A-26.2. Statutes that employ a presumption, rather than a cutoff, would allow a defendant with an

referring to a particular IQ score had a definitive view on the SEM at the time *Atkins* was decided—except Arizona, which expressly required that the SEM be considered. Ariz. Rev. Stat. Ann. §13-703.02(I)(4) (2001) (now codified at *id.* §13-753(K)(5)) ("The court in determining the intelligence quotient shall take into account the margin of error for the test administered.").

Florida also claims (at 42) that, when *Atkins* was decided, no State employed an "IQ threshold of 75" or permitted scores "within approximately five points of 70." As the legislative history of Florida's own statute makes clear, it could readily be interpreted to allow for an obtained score of "up to 75." Furthermore, five States and the United States had prohibited the execution of persons with mental retardation by statute without requiring any specific IQ score.[7] And the treatment of the SEM in most of the remaining States is unclear because courts had not decided the issue before *Atkins*.[8]

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obtained score within the SEM of 70 the opportunity to establish mental retardation if that is consistent with the evidence taken as a whole.

[7] *See* 18 U.S.C. §3596(c); Colo. Rev. Stat. §16-9-401(2) (2001) (now codified at *id.* §18-1.3-1101(2)); Ga. Code Ann. §17-7-131(a)(3); Ind. Code §35-36-9-2; Mo. Rev. Stat. §565.030(6); N.Y. Crim. Proc. Law §400.27(12)(e).

[8] Florida also makes much (at 18-19, 47) of the putative differences among the States' approaches to the *other* prongs of mental retardation. Those differences are exaggerated. For example, Florida identifies no material difference in the States' definitions of adaptive behavior. *Compare, e.g.*, Kan. Stat. Ann. §76-12b01(a), *with* Mo. Rev. Stat. §565.030(6). And no State has ever established an age of onset earlier than age 18; a State that protects even those whose symptoms manifest later does not violate *Atkins*. *E.g.*, Ind. Code §35-36-9-2 (age 22).

2. State law today does not support Florida

Florida (at 46-48) and its State amici (at 21-27) also contend that there is no present "national consensus" regarding use of the SEM. That misconceives the question before this Court. The relevant national consensus was that described in *Atkins*: a consensus against execution of persons with mental retardation, informed by the clinical definition of that condition. The Court is not being asked to adopt a new Eighth Amendment rule in this case, but to enforce the one it recognized in *Atkins*. A new inquiry into national consensus is thus unnecessary.

In any event, Florida's and its State amici's efforts to expand the number of States with a rule like Florida's fail. *See* Resp. Br. 46; States Br. 21. Many of the ten States they count simply have not decided the issue: Either a statutory reference to a specific IQ score has never been construed by the state courts, or the courts have never considered whether the SEM may or must be taken into account. Pet. Br. 46 n.20; *id.* App. 11a-52a.[9] Silence is not support. Florida is in a small minority of no more than five States where the courts have construed state law to impose an unscientific obtained IQ test score cutoff of 70. Pet Br. 46.

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[9] Justice Pariente's discussion of ten States that "do[] not apply the SEM" (Resp. Br. 46) likewise includes States where the issue has not been resolved. JA133 n.4 (citing Delaware, Maryland, North Carolina, and Washington despite no authoritative state court decisions). Justice Pariente also includes Tennessee (*id.*), which has rejected any rigid IQ test score cutoff, *Coleman* v. *State*, 341 S.W.3d 221, 241 (Tenn. 2011).

II. HALL HAS MENTAL RETARDATION

Although this Court need not itself decide the issue, the evidence that Hall has mental retardation is overwhelming. Pet. Br. 6-19, 49-52. Florida disregards the well-documented facts of Hall's life and his scores on valid IQ tests, relying instead on scores from tests that its own regulations prohibit courts from considering and invalid inferences drawn from Hall's crimes. Florida can do little more, since it never contested below that Hall has mental retardation as a clinical matter, instead relying entirely on Florida's IQ test score cutoff.

A. There Is Overwhelming Evidence Of Hall's Mental Retardation

Hall's mental retardation was obvious decades before *Atkins*. Hall learned how to "walk[] and talk[] long after" his siblings did. JA461. Teachers repeatedly described him as "mentally retarded" (JA528), and he failed in school (JA434). Hall never learned how to read and write or do basic arithmetic. JA383, JA435. He "never really functioned as an adult." JA527; *see* Pet. Br. 8 (describing Hall's inability successfully to live independently, hold down a job, or manage money). Even when Hall was on trial for his life, his attorneys testified that he was unable to assist in his own defense. JA479-480; 1991 ROA, Vol. IX, at 1567 (cited as "1993 Appeal ROA" in State's brief).[10]

Indeed, every psychiatrist and psychologist who conducted a complete evaluation of Hall including intel-

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[10] Florida argues that Hall "asserted no claim based on mental retardation" (at 3) for years after his initial sentencing. But Hall was not legally permitted to raise a mitigation argument based on mental retardation at that time. Pet. Br. 9-10.

ligence testing found that Hall has mental retardation. Pet. Br. 51-52. Hall was described as "significantly retarded" (Dr. Lewis) (JA507); "mentally retarded" (Dr. Toomer) (JA517); "mentally retarded" (Dr. Zimmerman) (JA527); "[f]unctional[ly] [r]etard[ed]" (Dr. Krop) (JA399); "mentally retarded" (Dr. Mosman) (JA431); and "mentally retarded" (Dr. Prichard) (JA454).

Florida identifies (at 3) only one person—Dr. Frank Carrera—who thought Hall had "average" intelligence. Dr. Carrera neither administered an IQ test nor reviewed any past IQ tests; his view was based only on a ninety-minute meeting with Hall. 1991 ROA, Vol. XII, at 1971, 1975. And Dr. Carrera was responsible for evaluating Hall's sanity and competence to stand trial—not his mental retardation. *Id.* 1970.[11] His off-hand assessment fails to controvert the uniform conclusion of all the other experts to evaluate Hall.

B. Florida's Contrary Arguments Fail

1. Unreliable test scores do not support Florida

Florida's principal response (at 8-9, 53-54) to Hall's ample evidence is to confuse the issue by citing Hall's IQ test scores on unreliable Beta and Kent tests. The scores Hall received on those tests are inadmissible un-

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[11] Florida cites (at 3 n.4) Dr. Carrera's testimony that Hall faked low intelligence to get out of military service. Dr. Carrera did not review any of the military's reports, relying instead on Hall's word. 1991 ROA, Vol. XII, at 1976. Indeed, much of his evaluation was based on information Hall provided (*id.* 1972), which unsurprisingly downplayed Hall's intellectual deficits (*id.* 1962, 1974). *See* AAIDD, *Intellectual Disability: Definition, Classification and Systems of Supports* 51-52 (11th ed. 2010) ("2010 *AAIDD Manual*") (persons with mental retardation often attempt to "mask their deficits").

der Florida's own rules. Fla. Admin. Code Ann. r. 65G-4.011(1). Indeed, the Florida Supreme Court recently refused to consider the results of a Beta test. *Franqui* v. *State*, 118 So. 3d 807 (Fla. 2013).[12] And other courts have recognized that the "Kent Test ha[s] not been shown to have any reliability or validity or to have any ability to accurately predict intellectual functioning." *Newman* v. *State*, 354 S.W.3d 61, 66 (Ark. 2009).[13]

Florida contends (at 54 & n.21) that these test scores can be considered, relying on a provision in its Rules of Criminal Procedure requiring the trial court to "consider the findings of the experts and all other evidence on the issue of whether the defendant is mentally retarded." Fla. R. Crim. P. 3.203(e). Not only does this argument run afoul of *Franqui*, but the specific provision mandating use of Wechsler and Stanford-Binet tests controls the general. *Morton* v. *Mancari*, 417 U.S. 535, 550-551 (1974); Scalia & Garner, *Reading Law* 183 (2012).

As Hall's brief explained (at 50-51), Hall's IQ scores on *valid* Wechsler tests are all within the SEM of 70.[14]

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[12] Franqui argued that a 1993 Beta score of less than 60 entitled him to an evidentiary hearing on intellectual functioning, despite Wechsler and Stanford-Binet scores above 70. Appellant Br. 53, *Franqui*, No. SC12-182 (Fla. Aug. 2012); *Franqui*, 118 So. 3d at 807. The Florida Supreme Court disagreed, reasoning that Franqui's "scores on the acceptable IQ tests were above 70." 118 So. 3d at 807.

[13] The Kent test is "not a commercially available instrument, but a 'homemade test'" that "consist[s] of ten questions, such as ... 'What are the names of some fish?'" *Newman*, 354 S.W.3d at 66.

[14] Hall also received a score of 80 on the WAIS-R, administered by a graduate student without on-site supervision. JA422-423, JA500-501. Dr. Lewis, the student's superior, testified that Hall "appeared possibly even more limited" (JA501) than a score of

When evaluating a person with scores in that range, any competent clinician would examine the person's adaptive functioning before ruling out mental retardation. And, in fact, every psychiatrist and psychologist who considered Hall's IQ scores and adaptive functioning diagnosed him with mental retardation.

2. Reliance on crime facts is clinically unjustified

Ignoring clinical standards, Florida impermissibly draws conclusions about Hall's adaptive behavior from the facts of the crime, including that it involved multiple steps. *See* AAIDD, *User's Guide* 20 (2012) ("Do not use past criminal behavior ... to infer level of adaptive behavior."). Courts and scholars recognize that relying on the facts of a crime to conclude that a defendant does not have mental retardation—diagnosis by anecdote—is improper. *See, e.g.*, *United States* v. *Nelson*, 419 F. Supp. 2d 891, 901-902 (E.D. La. 2006) (criminal conduct "has limited relevance to the mental retardation diagnosis, because it is isolated in contrast to the recurring patterns ... which indicate a low level of adaptive functioning"); Everington & Olley, *Implications of* Atkins v. Virginia, 8 J. Forensic Psychol. Prac. 1, 11 (2008) ("[A]daptive behavior is the individual's *typical* performance in his/her community setting. The details of the crime cannot be considered to be a sample of typical behavior."); Macvaugh & Cunningham, Atkins v. Virginia: *Implications and Recommendations for Forensic Practice*, 37 J. Psychiatry & L. 131, 166 (2009) (looking to crimes to assess adaptive behavior has not "been

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80 would suggest, and characterized Hall as "significantly retarded" (JA507). A psychologist who later evaluated Hall explained that the graduate student's test result should be viewed skeptically. Pet. Br. 18 n.10.

accepted by the professional psychiatric and psychological community").[15] Indeed, if commission of a capital crime—even a multi-step capital crime—negated a diagnosis of mental retardation, *Atkins* would have little meaning.[16]

More broadly, one of the "critically important foundational aspect[s]" of diagnosing mental retardation is taking into account that an individual's "limitations often coexist with strengths." AAIDD, *User's Guide* 25. A person with mental retardation may nonetheless "have capabilities and strengths ... [in] some adaptive-skill areas." *Id.* That a person can drive a car, for instance, does not indicate that his adaptive functioning is normal. *Holladay* v. *Allen*, 555 F.3d 1346, 1363 (11th Cir. 2009) ("Individuals with mental retardation have strengths and weaknesses, like all individuals.").

3. The trial court's other rulings are not at issue and are indefensible

Florida contends (at 55-56) that Hall's *Atkins* claim cannot succeed because his opening brief failed to challenge the trial court's rulings on the adaptive-

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[15] Florida misleadingly suggests (at 5 n.7, 52-53) that Dr. Krop believed the facts of Hall's crime were inconsistent with deficits in adaptive behavior. Florida mischaracterizes the testimony of one of Hall's former attorneys at a 1997 hearing on Hall's competence to be resentenced. The attorney testified that he had chosen not to call Dr. Krop at an earlier hearing, but framed the decision as a choice of one expert over another; he could not remember if Dr. Krop had stated that the facts of the crime made it difficult to provide favorable testimony. 1999 ROA, Vol. VII, at 252-253. In fact, Dr. Krop concluded that Hall was "[f]unctional[ly] [r]etard[ed]." JA399.

[16] The facts in *Atkins* bear strong resemblance to those in this case. *See* 536 U.S. at 307.

functioning and age-of-onset prongs. Hall did not challenge those rulings because the Florida Supreme Court did not reach them. JA125 (Hall's failure "to establish the requisite IQ" "end[ed] the inquiry").

In any event, the trial court's reasoning on those points is indefensible. The trial court concluded that Hall had not demonstrated deficits in adaptive functioning because he did not present evidence regarding his functioning in prison. But adaptive behavior is measured by a person's ability to cope in a normal environment, not in prison. AAIDD, *User's Guide* 20 ("The diagnosis of [mental retardation] is not based on the person's ... behavior in jail or prison[.]"). "The prison setting is an artificial environment that offers limited opportunities for many activities and behaviors defining adaptive behavior." Tassé 119, *supra* n.2. And Hall presented abundant evidence that his ability to function in the outside world was severely impaired. Pet. Br. 19; *see also id.* 6-8, 10-14, 51-52.

The trial court's approach to age of onset is equally flawed. The court held that Hall failed this prong because he could not show "quantitative evidence regarding ... I.Q. prior to the age of 18." JA112. This reasoning would prevent anyone who did not take an IQ test in childhood from receiving *Atkins*' protection—a self-evidently absurd result. It also violates basic clinical practices for making retrospective diagnoses, which include doing a "thorough history," including but not limited to considering past testing data "if possible." 2010 *AAIDD Manual* 95-96.

There is no reasonable dispute that Hall has mental retardation according to accepted clinical standards. That Florida intends to execute Hall notwithstanding his repeated, and uncontroverted, diagnoses of mental

retardation is perhaps the best evidence that its approach cannot be reconciled with *Atkins*.

CONCLUSION

The judgment of the Supreme Court of Florida should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

FREDDIE LEE HALL,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Writ of Certiorari to the Supreme Court of Florida in a Capital Case

BRIEF OF *AMICI CURIAE* THE AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, THE ARC OF THE UNITED STATES, THE NATIONAL DISABILITY RIGHTS NETWORK, DISABILITY RIGHTS FLORIDA, AND THE BAZELON CENTER FOR MENTAL HEALTH LAW IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI*[1]

Amici are professional and voluntary organizations in the field of intellectual disability.[2]

THE AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES (AAIDD) (formerly named the

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[1] This brief was written entirely by counsel for *amici*, as listed on the cover. No counsel for either party authored this brief in whole or in part, and neither counsel for a party nor any party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the members of the organizational *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. All parties have given written consent to the filing of this brief, and those documents have been filed with the Clerk's Office.

[2] Clinicians and professionals in the field now employ the term *intellectual disability* (ID). This change in terminology alters neither the clinical definition of the disability nor the size and identity of the group of individuals who have it. *See* Robert L. Schalock et al., *The Renaming of* Mental Retardation: *Understanding the Change to the Term* Intellectual Disability, 45 Intellectual & Developmental Disabilities 116, 116 (2007); American Association on Intellectual and Developmental Disabilities, *User's Guide: Intellectual Disability: Definition, Classification and Systems of Supports* 72 (2012) ("The term *intellectual disability* covers the same population of individuals who were diagnosed previously with mental retardation . . . ."); American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 33 (5th ed. 2013) ("Thus, *intellectual disability* is the term in common use by medical, educational, and other professions and by the lay public and advocacy groups."). This brief refers to *mental retardation* as a synonym for intellectual disability because both *Atkins v. Virginia*, 536 U.S. 304 (2002), and Florida law employ that term.

American Association on Mental Retardation), founded in 1876, is the nation's oldest and largest organization of professionals in the field of intellectual disability (mental retardation). Primarily focused on clinical, psychological, scientific, educational, and habilitative issues, AAIDD also has a longstanding interest in legal issues that affect the lives of people with intellectual disability. AAIDD has appeared as *amicus curiae* in this Court in a variety of cases involving mental disability, including *Atkins v. Virginia*, 536 U.S. 304 (2002). AAIDD has formulated the most widely-accepted clinical definition of intellectual disability, which was noted by this Court in *Atkins*, 536 U.S. at 308 n.3 (2002). *See* AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Supports* (11th ed. 2010). Both as the formulator of the clinical definition of mental retardation and as an interdisciplinary membership organization concerned with maintaining appropriate professional standards in the diagnosis of mental retardation, AAIDD and its members have a strong interest in the manner in which *Atkins* claims are evaluated by the courts.

THE ARC OF THE UNITED STATES is the nation's largest community-based organization of and for people with intellectual and developmental disabilities. The Arc advocates for the rights and full participation of all children and adults with intellectual and developmental disabilities. It provides an array of services and support for families and individuals and includes 140,000 members affiliated through 700 state and local chapters across the nation. The Arc is devoted to ensuring the civil

rights of and promoting and improving supports and services for all people with intellectual and developmental disabilities. The Arc also participated as *amicus curiae* in *Atkins v. Virginia*.

THE NATIONAL DISABILITY RIGHTS NETWORK (NDRN) is the membership association of protection and advocacy (P&A) agencies, which are located in all 50 states, the District of Columbia, Puerto Rico, and the territories (the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands). P&As are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of all persons with disabilities in a variety of settings. The P&A system comprises the nation's largest provider of legally-based advocacy services for persons with disabilities.

DISABILITY RIGHTS FLORIDA is a not-for-profit corporation serving as Florida's federally-funded protection and advocacy system for individuals with disabilities. Disability Rights Florida's mission is to advance the quality of life, dignity, equality, self-determination, and freedom of choice of people with disabilities through collaboration, education, and advocacy, as well as legal and legislative strategies. Specifically, on behalf of persons with intellectual or developmental disabilities, Disability Rights Florida is authorized by federal law to "pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of, and advocacy for, the rights of such individuals within the State . . . ." 42 U.S.C. § 15043(a)(2)(A) (2011). Disability Rights Florida has represented and continues to represent persons

with disabilities in individual actions, class actions, and systemic relief initiatives affecting all such individuals. The protection and advocacy system is unique in its authority to protect and advocate for the legal and human rights of persons with disabilities and its presence will provide a necessary perspective to assist the Court in this matter.

THE BAZELON CENTER FOR MENTAL HEALTH LAW is a national public interest organization founded in 1972 to advocate for the rights of individuals with mental disabilities. Through litigation, legislative and administrative advocacy, and public education, the Bazelon Center promotes equal opportunities for individuals with mental disabilities in all aspects of life, including employment, education, housing, health care, community living, voting, and family rights.

SUMMARY OF ARGUMENT

In implementing this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), both judges and clinicians must carefully evaluate whether a defendant satisfies the clinical definition of mental retardation. This process requires attention to both the measurement of intellectual ability (IQ testing) and the functional impairment experienced in the individual's abilities in life.

After decades of intensive study, mental disability professionals have a substantial understanding of what an individual's score on an IQ test can tell us and what it cannot. There is a strong

consensus among psychologists, psychiatrists, and other clinicians, as well as their professional associations, that imposing an arbitrary IQ cutoff score of 70 is wholly inconsistent with our scientific understanding of these instruments.

Florida courts responsible for adjudicating *Atkins* cases are precluded from fairly evaluating *all* of the essential evidence that has probative value in making that determination. Evidence about a defendant's impaired adaptive functioning—in this case, clearly impaired starting in childhood—cannot be ignored merely because of a judicially-imposed rule which is neither clinically nor scientifically justified.

In *Atkins*, this Court invited States to devise "appropriate procedures to enforce the constitutional restriction" against executing individuals with mental retardation. *Atkins*, 536 U.S. at 317. The Florida Supreme Court's arbitrary rule prevents consideration of relevant evidence and excludes from the Constitution's protection a considerable portion of those persons who have mental retardation. It therefore cannot be deemed "appropriate." Effectively reducing the group of individuals entitled to that protection by means of an arbitrary rule can hardly be deemed to be "enforcement" of the right that this Court announced.

ARGUMENT

I. THE EIGHTH AMENDMENT PROHIBITS STATES FROM EXECUTING ANY PERSON WITH MENTAL RETARDATION.

It is unconstitutional to execute any individual with mental retardation.

When this Court reached that conclusion more than a decade ago, it explained that it had done so for two principal reasons. First, there was a national consensus that imposing the death penalty on a person with mental retardation was unacceptable. In the span of just thirteen years following the decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989), sixteen more States had enacted statutes to protect individuals with an intellectual disability from execution. *Atkins v. Virginia*, 536 U.S. 304, 313–16 (2002). When evaluated with further evidence of public opinion and professional judgments about the practice found in survey results and the resolutions of relevant professional organizations, it was clear that the execution of any person with mental retardation had become almost universally recognized as an unacceptable practice.[3]

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[3] *Atkins*, 536 U.S. at 317 n.21 ("[W]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."); *accord* U.N. Comm'n on Hum. Rts., *Human Rights Resolution 2005/59: The Question of the Death Penalty*, para. 7(c), E/CN.4/RES/2005/59 (Apr. 20, 2005), http://www.refworld.org/docid/45377c730.html (last visited Dec. 13, 2013).

Second, the Court also concluded that the judgments expressed in legislation were consistent with its own "independent evaluation" of the constitutional principles involved. *Atkins*, 536 U.S. at 321. Because of the nature of intellectual disability, the Court concluded that executing individuals with mental retardation would not "'measurably contribute[]'" to the criminal law's purposes of retribution or deterrence, and, as a result, would be constitutionally unacceptable punishment. *Atkins*, 536 U.S. at 319 (quoting *Enmund v. Florida*, 458 U.S. 782, 798 (1982)). In addition, that same "reduced capacity of mentally retarded offenders" increases the potential for wrongful imposition of the death penalty, or even wrongful conviction. *Atkins*, 536 U.S. at 320. The Court made particular note of defendants' impaired ability to assist defense counsel, as well as the disconcerting propensity of some defendants with intellectual disability to confess to crimes they did not commit.[4] *Atkins*, 536 U.S. at 320–21.

Having found that the execution of any individual with mental retardation is cruel and unusual punishment, the Court left "'to the State[s]

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[4] Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 Psychological Science in the Public Interest 33, 53 (2004) ("The disproportionate numbers of mentally retarded individuals in the population of proven false confessors suggests that they are also at risk in the interrogation room."); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 920 (2004). *See generally* Margaret Edds, *An Expendable Man: The Near-Execution of Earl Washington, Jr.* (2003).

the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'" *Atkins*, 536 U.S. at 317 (quoting *Ford v. Wainwright*, 477 U.S. 399, 416–17 (1986)). At its heart, the case at bar raises the question of whether that authorization to the States permits Florida to define mental retardation in such an arbitrary manner that it violates the Constitution's "substantive restriction on the State's power to take the life of a mentally retarded offender." *Atkins*, 536 U.S. at 321 (internal quotation marks omitted).

II. THE DIAGNOSIS OF MENTAL RETARDATION, WHICH INCLUDES BOTH SUBAVERAGE INTELLECTUAL FUNCTIONING AND DEFICITS IN ADAPTIVE BEHAVIOR, MUST COMPORT WITH SCIENTIFIC UNDERSTANDING.

A. The Definition of Mental Retardation (Intellectual Disability).

The phenomenon of intellectual disability has been recognized throughout history,[5] and although various descriptions have been formulated over the ages, the current clinical understanding of mental retardation reflects a commonly accepted consensus that has endured for more than half a century. The definition has three basic elements: (1) significant impairments in intellectual functioning, as measured by IQ testing; (2) deficits in real-world skills and

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[5] *See, e.g.*, Nigel Walker, 1 *Crime and Insanity in England* 35–37 (1968).

abilities resulting from the disability (adaptive behavior deficits); and (3) onset of the disability before the individual became an adult.[6] While there are minor variations in the precise terms that are used to describe these elements,[7] they all describe

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[6] The third prong of the definition, manifestation during the developmental period (i.e., at birth or in childhood), is not at issue in this case. *See* JA528.

[7] As defined by the AAIDD:

> Intellectual disability is characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18.

AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Supports* 1 (11th ed. 2010) [hereinafter AAIDD, *2010 Manual*].

The American Psychiatric Association has adopted similar language in defining "Intellectual Disability (Intellectual Developmental Disorder)":

> Intellectual disability (intellectual developmental disorder) is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains. The following three criteria must be met:
>
> A. Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing.

the same basic phenomenon,[8] and identify the same group of individuals as persons having mental retardation.

B. The Role of IQ Testing.

"Significantly subaverage intellectual functioning," *Atkins*, 536 U.S. at 308 n.3, is an essential component of the clinical definition, and thus the diagnosis, of mental retardation. "Significantly subaverage" is a term of art indicating that the individual's measured intelligence falls approximately two standard deviations below the mean. (It is generally accepted that this means that

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> B. Deficits in adaptive functioning that result in failure to meet developmental and socio-cultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community.
>
> C. Onset of intellectual and adaptive deficits during the developmental period.

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 33 (5th ed. 2013) [hereinafter APA, *DSM-5*]; *see also* American Psychological Association, *Manual of Diagnosis and Professional Practice in Mental Retardation* 13 (John W. Jacobson & James A. Mulick eds., 1996).

[8] Similarly, there is no substantive difference between the current AAIDD and American Psychiatric Association definitions and the then-current versions cited by the Court in *Atkins*. *Atkins*, 536 U.S. at 308 n.3.

fewer than three percent of the population could be classified as having mental retardation.) This reduced mental functioning is measured by IQ testing. Developed in the early years of the twentieth century, and continually refined and improved,[9] these psychometric instruments are our best tool for obtaining an objective, quantitative measure of intellectual functioning.

The concept of "intelligence" came more sharply into focus when IQ tests became available. These instruments can be thought of as measuring what the individual has learned over time, and thus reflect his or her ability or capacity to learn.[10] The psychologist who developed one of the most commonly-used IQ tests noted 75 years ago, "Intelligence is the aggregate or global capacity of the individual to act purposefully, to think rationally and to deal effectively with his environment."[11]

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[9] *See* John D. Wasserman, *A History of Intelligence Assessment: The Unfinished Tapestry*, in *Contemporary Intellectual Assessment: Theories, Tests, and Issues* 3, 3–55 (Dawn P. Flanagan & Patti L. Harrison eds., 3d ed. 2012); Alan S. Kaufman & Elizabeth O. Lichtenberger, *Assessing Adolescent and Adult Intelligence* 3–7 (3d ed. 2006); Anne Anastasi & Susana Urbina, *Psychological Testing* 32–38 (7th ed. 1997). For discussion of the development of IQ testing in America, see Leila Zenderland, *Measuring Minds: Henry Herbert Goddard and the Origins of American Intelligence Testing* (1998).

[10] Alan S. Kaufman & Elizabeth O. Lichtenberger, *Assessing Adolescent and Adult Intelligence* 23 (3d ed. 2006); Anne Anastasi & Susana Urbina, *Psychological Testing* 296 (7th ed. 1997).

[11] David Wechsler, *The Measurement of Adult Intelligence* 3 (1st ed. 1939). *Accord* AAIDD, *2010 Manual*, *supra* note 7, at

The role of IQ testing in the diagnosis of mental retardation is to ensure that the disability that an individual experiences is accompanied by limitations in mental functioning. Impairment of intellectual ability that falls short of the requirement of two standard deviations below the mean, standing alone, is insufficient to support a conclusion that an individual has mental retardation. As the AAIDD classification manual cautions, subaverage intellectual functioning "is a necessary but insufficient criterion to establish a diagnosis" of mental retardation. [12]

C. The Role of Deficits in Adaptive Functioning.

It has long been recognized that measurement of IQ, standing alone, is insufficient to justify a diagnosis of mental retardation,[13] but rather must be

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32 ("Individuals vary in their ability to understand complexities and reason, adapt to the environment, and use thought to solve problems.").

[12] AAIDD, *2010 Manual*, *supra* note 7, at 41. "The intent of this definition is not to specify a hard and fast cutoff point/score for meeting the significant limitations in intellectual functioning criterion of ID. . . . In addition, significant limitations in intellectual functioning is only one of the three criteria used to establish a diagnosis of ID." *Id.* at 35.

[13] *See, e.g.*, Rick Heber, *A Manual on Terminology and Classification in Mental Retardation*, 64 American Journal of Mental Deficiency (Monograph Supp.) 1. 55–56 (Sept. 1959) ("*Measured intelligence* cannot be used as the sole criterion of mental retardation since intelligence test performances do not always correspond to level of deficiency in total adaptation.") (italics in original). *See generally* Kazuo Nihira, *Adaptive Behavior: A Historical Overview*, in *Adaptive Behavior and its*

accompanied by substantial deficits in adaptive skills. A focus on what an individual is unable to do, or unable to do well, is central to the understanding of mental retardation as a disability.[14] In areas outside of the criminal justice system, such as education and disability services, this helps ensure that poor test takers are not incorrectly diagnosed as having mental retardation. In the *Atkins* context, it is the *functional* limitations imposed by that disability, not the number on an IQ score, that "diminish [these defendants'] personal culpability," *Atkins*, 536 U.S. at 318, and increase the "risk of wrongful execution." *Id.* at 320–21.

Often, as was abundantly clear in this case, the functional disability of mental retardation is observed and identified before any IQ test is administered.[15] Although there will be cases of valid mental retardation diagnoses of adults whose childhood evidence is less stark than in this case, the

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Measurement: Implications for the Field of Mental Retardation 7, 7–12 (Robert L. Schalock ed., 1999); Marc J. Tassé, *Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases*, 16 Applied Neuropsychology 114, 115–17 (2009).

[14] AAIDD, *2010 Manual*, *supra* note 7, at 45 ("Adaptive behavior as defined in this Manual is the collection of conceptual, social, and practical skills that have been learned and are performed by people in their everyday lives.").

[15] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 42 (4th ed., text rev. 2000) ("Impairments in adaptive functioning, rather than a low IQ, are usually the presenting symptoms in individuals with Mental Retardation.").

third prong of the clinical definition requires some manifestation of the disability before an individual becomes an adult. But whatever the sequence in arriving at a diagnosis in an individual case, it is the *functional impairment* that is central to our understanding of intellectual disability, and central to why that diagnosis matters.[16]

D. The Issue of "Measurement of Error" in Determining a Person's IQ.

As noted earlier, IQ tests were first devised and administered over 100 years ago. Our scientific understanding of these instruments evolved over the century, but became substantially more advanced over the last few decades. Psychologists and other clinicians now have an increasingly clear view of the strengths and limitations of the IQ tests, as well as their proper administration and interpretation.[17]

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[16] APA, *DSM-5*, *supra* note 7, at 37 ("IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks. For example, a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person's actual functioning is comparable to that of individuals with a lower IQ score.").

[17] An indication of the intensity of the professional feedback and review of the instruments is the plethora of scholarly articles and books analyzing and criticizing various aspects of the tests and suggesting improvements. For example, the Wechsler instruments have engendered "several thousand publications" of clinical commentary. Anne Anastasi & Susana Urbina, *Psychological Testing* 215 (7th ed. 1997). These comments, critiques, and testing results are then evaluated and

Although IQ tests have become more refined and sophisticated, the interpretation of their results still requires experienced and knowledgeable professional judgment of psychologists or other clinicians.[18]

Each of the major psychometric instruments commonly used to measure intelligence has been pretested and normed on the relevant populations

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incorporated into later iterations of the instrument. *See* American Educational Research Association, American Psychological Association & National Council on Measurement in Education, *Standards for Educational and Psychological Testing* 42 (1999) ("Tests and their supporting documents (e.g., test manuals, technical manuals, user's guides) are reviewed periodically to determine whether revisions are needed.").

[18] AAIDD, *2010 Manual*, *supra* note 7, at 40 ("As discussed in reference to the operational definition of significant limitations in intellectual functioning, the intent of using approximately two standard deviations below the mean is to reflect the role of clinical judgment in weighing the factors that contribute to the validity and precision of a diagnostic decision."); AAIDD, *User's Guide: Intellectual Disability: Definition, Classification and Systems of Supports* 9 (2012) ("Clinical judgment is a special type of judgment rooted in a high level of clinical expertise and experience; it emerges directly from extensive data."); APA, *DSM-5*, *supra* note 7, at 37 ("Clinical training and judgment are required to interpret test results and assess intellectual performance."); American Educational Research Association, American Psychological Association & National Council on Measurement in Education, *Standards for Educational and Psychological Testing* 131 (1999) (Comment to Standard 12.1) ("Test interpretation in this context requires professionally responsible judgment that is exercised within the boundaries of knowledge and skill afforded by the professional's education, training, and supervised experience."). *See generally* Robert L. Schalock & Ruth Luckasson, *Clinical Judgment* (2005).

prior to its publication.[19] After assessing the validity and reliability of a particular IQ test,[20] its developers also establish the degree of precision (and imprecision) that will be encountered by clinicians in administering the test to individuals, along with

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[19] Richard W. Woodcock, *Norms*, in 2 *Encyclopedia of Human Intelligence* 770, 770 (Robert J. Sternberg ed., 1994) ("*Norm tables* provide the examiner with information to convert the raw score into one or more *derived scores* that provide a more meaningful basis for describing performance on a test." (italics in original)). For any particular instrument, it is essential that the population sample from which the norming is derived must be representative of the overall population. *Id.* at 774; American Educational Research Association, American Psychological Association & National Council on Measurement in Education, *Standards for Educational and Psychological Testing* 51 (1999) ("It is then important that the norms be based on a technically sound, representative, scientific sample of sufficient size.").

[20] Gary Groth-Marnat, *Handbook of Psychological Assessment* 15 (5th ed. 2009) ("Whereas reliability addresses issues of consistency, validity assesses what the test is to be accurate about."); Pamela A. Moss, *Validity*, in 2 *Encyclopedia of Human Intelligence* 1101, 1101 (Robert J. Sternberg ed., 1994); Cecil R. Reynolds, *Reliability*, in 2 *Encyclopedia of Human Intelligence* 949, 949 (Robert J. Sternberg ed., 1994); *see also* David H. Kaye & David A. Freedman, *Reference Guide on Statistics*, in *Reference Manual on Scientific Evidence* 211, 227–29 (Federal Judicial Center & National Research Council of the National Academies eds., 3d ed. 2011) ("Reliability is necessary but not sufficient to ensure accuracy. In addition to reliability, validity is needed. A valid measuring instrument measures what it is supposed to." *Id.* at 228.); American Educational Research Association, American Psychological Association & National Council on Measurement in Education, *Standards for Educational and Psychological Testing* 9–17 (1999).

standards for its administration and the proper scoring of results.[21]

As with any measurement in any area of our lives, ascertaining an individual's IQ necessarily includes a degree of imprecision. Rather than ignore this potential for imprecision, or make claims for a greater level of certainty than the scientific facts warrant, psychologists and other clinicians have addressed the issue directly. "Because all measurement in science is imperfect, psychologists have developed mathematical theories to assist them in determining how well tests measure psychological traits or characteristics."[22] This recognition has produced a specific tool, which is known as the "standard error of measurement," or SEM.[23]

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[21] American Educational Research Association, American Psychological Association & National Council on Measurement in Education, *Standards for Educational and Psychological Testing* 37–41 (1999).

[22] Edward J. Slawski, *Error of Measurement*, in 1 *Encyclopedia of Human Intelligence* 395, 395 (Robert J. Sternberg ed., 1994).

[23] Psychologists do not use the word "error" in the way it is employed in ordinary language, i.e., as a synonym for "mistake," perhaps connoting something amenable to correction through better effort. The SEM is not a "mistake" in the sense that mistakes are avoidable, nor is it an "error" that can be "fixed." Rather, "error" is a term of art that describes the inevitable imprecision of any psychometric measurement. *See* Earl Hunt, *Human Intelligence* 313 (2011) ("Any measurement contains two elements, a 'true value' and a residual term. While the residual term is frequently referred to as 'error,' it is not necessarily error in the sense of a mistake. It refers to the sum of all influences on the measured variable that are statistically independent of the true value.").

The standard error of measurement is essentially a quantification of the likelihood that the score that was achieved on a particular administration of a test on a particular day was a truly accurate measure.[24] Since it is not possible to evaluate that accuracy through repetition of the testing, the statistical tool of SEM quantifies the evaluator's level of confidence in the score. Viewed another way, the SEM represents the professionally-required level of modesty about the precision and accuracy of the results of a particular individual's test.

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[24] Domenic V. Cicchetti, *Guidelines, Criteria, and Rules of Thumb for Evaluating Normed and Standardized Assessment Instruments in Psychology*, 6 Psychological Assessment 284, 285 (1994) ("The standard error of measurement defines that amount of test-retest variability that is expected to occur on the basis of the inherent imprecision of the assessment instrument itself."); Robert M. Thorndike & Tracy Thorndike-Christ, *Measurement and Evaluation in Psychology and Education* 132 (8th ed. 2010) ("Another way to view the standard error of measurement is as an indication of how much a person's score might change on retesting. Each person's score on the first testing contains some amount of error."); David H. Kaye & David A. Freedman, *Reference Guide on Statistics*, in *Reference Manual on Scientific Evidence* 211, 243 (Federal Judicial Center & National Research Council of the National Academies eds., 3d ed. 2011) ("An estimate based on a sample is likely to be off the mark, at least by a small amount, because of random error. The standard error gives the likely magnitude of this random error, with smaller standard errors indicating better estimates."); Gary Groth-Marnat, *Handbook of Psychological Assessment* 15 (5th ed. 2009) ("The logic behind the SEM is that test scores consist of both truth and error. Thus, there is always noise or error in the system, and the SEM provides a range to indicate how extensive that error is likely to be.").

The general scientific principles underlying the standard error of measurement apply fully to the use of IQ testing to determine whether an individual has mental retardation. Indeed, taking it into account is essential for the accurate assessment of intellectual disability. "[T]he assessment of intellectual functioning through the reliance on intelligence tests is fraught with the potential for misuse if consideration is not given to possible errors in measurement."[25] There is a strong consensus among clinicians that the SEM must always be taken into account when assessing whether the results of an individual's testing satisfy the first prong of the definition of mental retardation.[26]

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[25] American Association on Mental Retardation, *User's Guide: Mental Retardation: Definition, Classification and Systems of Supports* 12 (2007).

[26] *See, e.g.*, AAIDD, *2010 Manual*, *supra* note 7, at 36 ("Understanding and addressing the test's standard error of measurement is a critical consideration that must be part of any decision concerning a diagnosis of ID that is based, in part, on significant limitations in intellectual functioning."); APA, *DSM-5*, *supra* note 7, at 37 ("Individuals with intellectual disability have scores of approximately two standard deviations or more below the population mean, including a margin for measurement error (generally + 5 points). On tests with a standard deviation of 15 and a mean of 100, this involves a score of 65–75 (70 ± 5)."); Samuel M. Turner et al., *APA's Guidelines for Test User Qualifications: An Executive Summary*, 56 American Psychologist 1099, 1101 (2001) ("Test users should understand issues of test score reliability and measurement error as they apply to the specific test being used . . . ."); Caroline Everington & J. Gregory Olley, *Implications of Atkins v. Virginia: Issues in Defining and Diagnosing Mental Retardation*, 8 J. Forensic Psychol. Prac. 1, 6 (2008) ("There is no finite score that can represent one's intellectual functioning with 100% accuracy. There is always a measurement error.");

III. DIAGNOSING MENTAL RETARDATION REQUIRES CAREFUL CONSIDERATION OF ALL THE RELEVANT EVIDENCE ABOUT AN INDIVIDUAL, NOT JUST AN IQ SCORE.

Clinicians in the field of intellectual disability agree that determining whether an individual has mental retardation involves evaluation of both intellectual functioning and adaptive deficits.[27]

John Parry & Eric Y. Drogin, *Criminal Law Handbook on Psychiatric and Psychological Evidence and Testimony* 70 (2000) ("[D]ue to a generally estimated five-point margin of error in standardized intelligence testing, a person with a measured IQ as high as 75 could be deemed to have met the diagnostic criteria for mental retardation, if requisite functional shortcomings are also noted."); Gilbert S. Macvaugh III & Mark D. Cunningham, *Atkins v. Virginia: Implications and Recommendations for Forensic Practice*, 37 J. Psychiatry & L. 131, 147 (2009) ("Reports of IQ scores obtained by a capital defendant should include a description of these scores in light of the SEM at an identified confidence interval."); Richard J. Bonnie & Katherine Gustafson, *The Challenge of Implementing Atkins v. Virginia: How Legislatures and Courts Can Promote Accurate Assessments and Adjudications of Mental Retardation in Death Penalty Cases*, 41 U. Richmond L. Rev. 811, 836 (2007) ("The main point here is that the SEM must *always* be taken into account when interpreting scores on IQ tests; failing to do so would be a clear departure from accepted professional practice in scoring and interpreting any kind of psychological test, including IQ tests." (emphasis in original)).

[27] Alan S. Kaufman & Elizabeth O. Lichtenberger, *Assessing Adolescent and Adult Intelligence* 336 (3d ed. 2006) ("Thus, because of the differences between intelligence and adaptive behavior, the IQ profile of an individual should not be examined without the coinciding data from adaptive behavior measures.").

Diagnosing an individual who may have intellectual disability requires a psychologist or other mental disability professional to consider both the results of IQ testing and the evidence of that individual's actual functioning in the world. Aided by the testimony of those professionals, courts with the responsibility for deciding *Atkins* cases must then evaluate the same evidence, and determine whether the defendant "fall[s] within the range of mentally retarded offenders about whom there is a national consensus." *Atkins*, 536 U.S. at 317.

There are no easy short-cuts available to courts in making this decision—a decision with a defendant's life in the balance. Both for clinicians and for courts, this involves weighing all the relevant evidence. "The diagnosis of ID is intended to reflect a clinical judgment rather than an actuarial determination." AAIDD, *User's Guide: Intellectual Disability: Definition, Classification and Systems of Supports* 23 (2012). This means that the courts must give careful consideration to evidence concerning both intellectual functioning and deficits in adaptive functioning.

In evaluating whether a defendant's intellectual functioning satisfies that component of the definition, a court must view all the available evidence, and must do so in light of scientific understanding about the tests that have been administered. "A fixed point cutoff score for ID is not psychometrically justifiable." AAIDD, *2010 Manual*, *supra* note 7, at 40.

Similarly, evidence about whether the individual had deficits in adaptive behavior cannot be ignored by a court on the basis of an artificial requirement concerning IQ scores. After all, it is just those real-world functional limitations that led to both the national consensus and this Court's judgment in *Atkins*.

Only after such a full and unfettered evaluation, can a court determine whether a defendant should receive the "'substantive'" protection that the Constitution guarantees. *Atkins*, 536 U.S. at 321 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)).

IV. FLORIDA'S ARBITRARY REFUSAL TO ALLOW TRIAL COURTS TO CONSIDER THE SCIENCE OF IQ TESTING AND THE CLINICAL UNDERSTANDING OF MENTAL RETARDATION RISKS THE EXECUTION OF DEFENDANTS WHO ARE PROTECTED BY THE EIGHTH AMENDMENT.

Most States have adopted procedures in a manner consistent with the substantive constitutional protection recognized in *Atkins*.[28] But

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[28] Several States have enacted statutes that include a specific IQ score, but use that score as a rebuttable presumption about whether a defendant has mental retardation. *E.g.*, Neb. Rev. Stat. § 28-105.01(3) (2008 & Supp. 2013) ("An intelligence quotient of seventy or below on a reliably administered intelligence quotient test shall be presumptive evidence of intellectual disability."). Other States clearly allow consideration of evidence of SEM, or establish a higher IQ score than 70 in order to allow for consideration of factors like SEM.

Florida (along with, at most, a small handful of other States) has prevented a fair consideration of whether defendants have mental retardation by erecting a barrier to fair adjudication in the form of an artificial ceiling on IQ scores.[29]

E.g., Okla. Stat. tit. 21, § 701.10b(C) (Supp. 2014) ("In determining the intelligence quotient, the standard measurement of error for the test administered shall be taken into account."). Still other States, which have no IQ score in their statutes, or which have no statute, have explicitly rejected a hard cap on IQ scores. *See, e.g.*, *Commonwealth v. Miller*, 888 A.2d 624, 630–31 (Pa. 2005) ("The concept should also take into consideration the standard error of measurement (hereinafter 'SEM') for the specific assessment instruments used. . . . [W]e do not adopt a cutoff IQ score for determining mental retardation in Pennsylvania, since it is the interaction between limited intellectual functioning and deficiencies in adaptive skills that establish mental retardation."). Finally, a number of States have not yet addressed the issue.

[29] There appear to be, at most, five States (Florida, Alabama, Virginia, Idaho, and Kentucky) that impose an inflexible ceiling at an IQ score of 70.

Although it is less than perfectly clear, it is possible that the list of States that insist on a rigid cap which excludes evidence such as SEM may be even smaller:

In Idaho, the statute requires an IQ score of "seventy (70) or below." Idaho Code Ann. § 19-2515A(1)(b) (2004). In the only reported case interpreting the statute, the Idaho Supreme Court upheld the trial court's dismissal of a defendant's claim to protection under the statute, and noted that "the legislature did not require that the IQ score be within five points of 70 or below. It required that it be 70 or below." *Pizzuto v. State*, 202 P.3d 642, 651 (Idaho 2008). But the court, apparently seeing no evidence that the defendant was within the class protected by the statute, held that "[t]he district court was entitled to draw reasonable inferences from the undisputed facts." *Id.* at 651. In rejecting a federal challenge to the Idaho Supreme Court

V. WHEN THIS COURT ENTRUSTED THE STATES WITH DEVELOPING APPROPRIATE PROCEDURES IN *ATKINS*, IT DID NOT INVITE THEM TO LIMIT THE SUBSTANTIVE CONSTITUTIONAL PROTECTION TO ONLY SOME OF THE DEFENDANTS WHO HAVE MENTAL RETARDATION.

Having concluded that the execution of any individual with mental retardation constitutes cruel and unusual punishment, this Court, in *Atkins*, entrusted to the States "the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Atkins*, 536 U.S. at 317 (internal quotations marks omitted). Allowing the States to establish their own procedures for the enforcement of the "substantive restriction on the State's power to take the life of a mentally retarded offender," *Atkins*, 536 U.S. at 321

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decision, the Court of Appeals characterized the state court as "only implicitly consider[ing] the standard error of measurement (SEM)." *Pizzuto v. Blades*, 729 F.3d 1211, 1223 (9th Cir. 2013).

In Kentucky, the statute references an IQ "of seventy (70) or below." Ky. Rev. Stat. Ann. § 532.130(2) (LexisNexis 2012). In a series of cases, the Kentucky Supreme Court rejected constitutional challenges to that provision of the statute, but in a footnote to its most recent decision (the individual facts of which the court described as "not even a close case," *Bowling v. Commonwealth*, 377 S.W.3d 529, 539 (Ky. 2012)), it mentioned changes in scientific understanding of IQ testing, and concluded, "This highlights the need for us to consider the AAMR Guideline revisions *in the context of an actual case or controversy*." 377 S.W.3d at 541 n.24 (emphasis added).

(internal quotation marks omitted), permitted them to incorporate the protection of those defendants into the design of each State's statutory and rule-based system for conducting criminal cases. As the Court noted, "Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." *Atkins*, 536 U.S. at 317.

Obviously, the Court did not demand (nor did it expect) perfect uniformity of procedures among the States. But the commitment in *Atkins* of the responsibility for devising procedures most certainly was *not* an invitation for any State to substantially reduce the number of individuals entitled to constitutional protection by means of arbitrarily barring a fair adjudication of whether or not they have mental retardation.

There is no need for this Court to micromanage the precise terminology of the States' definitions, nor is it necessary to dictate every detail of the procedures to be employed in adjudicating individual cases. *See, e.g.*, *Panetti v. Quarterman*, 551 U.S. 930 (2007). But the *appropriate* procedures the Court called for must be procedures that both comport with the clinical understanding of intellectual disability and protect "the entire category of mentally retarded offenders . . . ." *Roper v. Simmons*, 543 U.S. 551, 563 (2005). The States were charged to adopt procedures that are appropriate "*to enforce* the constitutional restriction" which is at the heart of *Atkins*, 536 U.S. at 304 (emphasis added). It can hardly be said to "enforce"

a guarantee when a State procedurally excludes a substantial segment of the group constitutionally entitled to its protection.

Under Florida's scheme, a capital defendant whose intelligence actually meets the accepted definition (two standard deviations below the mean) may not receive fair consideration of the full body of evidence demonstrating the true extent of his disability. [30]

Despite testimony below that "mental retardation is considered to be a range or band of scores, not just one score or a specific cutoff for mental retardation" and that "no one IQ score is exact or succinct, that there's always some variability and some error built in," *Cherry v. State*, 959 So. 2d 702, 711 (Fla. 2007), the Florida Supreme Court held that the "plain meaning" of the statute was that "[u]nder Florida law, one of the criteria to determine if a person is mentally retarded is that he or she has an IQ of 70 or below." *Id.* at 713. And, having held that the first prong of the definition required meeting a cutoff score of 70, the court went

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[30] The text of the Florida statute does not dictate this result. *See* Fla. Stat. Ann. § 921.137(1) (2006 & Supp. 2014) ("As used in this section, the term 'intellectually disabled' or 'intellectual disability' means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term 'significantly subaverage general intellectual functioning,' for purposes of this section, means performance that is *two or more standard deviations from the mean score* on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities." (emphasis added)).

on to hold that since the defendant "does not meet the first prong" of the definition, "we do not consider the two other prongs of the mental retardation determination." *Id.* at 714. The court has subsequently emphasized that the "strict cut-off IQ score of two standard deviations from the mean score . . . is *exactly 70*," *Franqui v. State*, 59 So. 3d 82, 91 (Fla. 2011) (emphasis added), and that "[t]he law is also established that where a defendant does not meet the first prong, the court *will not consider* the other two prongs." *Id.* (emphasis added).[31]

There is, of course, a superficial attraction to imposing a rigid and arbitrary "bright line," in order to ease the task of courts that have the responsibility for adjudicating individual cases. But as this Court noted in the same Term that it decided *Atkins*, "the Constitution's safeguards of human liberty in the area of mental illness and the law are not always best enforced through precise bright-line rules." *Kansas v. Crane*, 534 U.S. 407, 413 (2002). The same is true regarding intellectual disability. Mere convenience for the judicial system cannot be allowed to restrict the scope of the Constitution's substantive protection, nor can it be used to preclude a fair evaluation of whether an individual is entitled to that protection.

Florida refuses to allow the full evaluation of evidence of a defendant's disability in cases where the IQ score falls outside of an artificially-drawn boundary. Fact-finders are forbidden from even

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[31] Other States with an IQ score in their statutes have found ways to avoid this harsh result. *See supra* note 28.

considering evidence of the functional impairment in the life of an individual whose measured intelligence may well be two standard deviations below the mean but which does not meet the arbitrary and scientifically unjustifiable ceiling of a score of 70.

The Constitution forbids such an "arbitrary and capricious application" of the death penalty. *Kennedy v. Louisiana*, 554 U.S. 407, 447 (2008).

CONCLUSION

For the foregoing reasons, *amici* urge the reversal of the judgment of the Florida Supreme Court.

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v.

FLORIDA,

Respondent.

On Writ of Certiorari to the Supreme Court of Florida

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QUESTION PRESENTED

Whether the Florida scheme for identifying mentally retarded defendants in capital cases violates *Atkins v. Virginia*, 536 U.S. 304 (2002).

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the American Bar Association (the "ABA") respectfully submits this brief in support of Petitioner. While the ABA takes no position on the death penalty *per se*, the ABA asserts that before any defendant claiming mental retardation should be eligible for the death penalty, the defendant should be entitled to establish, pursuant to a constitutionally appropriate test, that both his or her level of intellectual functioning and conceptual, social and practical adaptive skills fall within the definitions used by recognized mental disability organizations for determining mental retardation.

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. Its nearly 400,000 members come from all fifty states and other jurisdictions, and include prosecutors, public defenders and private defense counsel, as well as attorneys in law firms, corporations, non-profit organizations, and government agencies. Its members also include judges, legislators, law professors, law students, and non-lawyer "associates" in related fields.[2]

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court.

[2] Neither this brief nor the decision to file it should be interpreted as reflecting the views of any judicial member of the ABA. No member of the ABA Judicial Division Council participated in this brief's preparation or in the adoption or endorsement of the positions in it.

Since its founding in 1878, the ABA has advocated for the improvement of the justice system. The ABA has long taken a special interest in the equitable treatment of individuals with mental retardation and mental disabilities and, since at least 1961, has published numerous books and studies on mental disability law.[3]

In addition to its focus on the treatment of individuals with mental disabilities, the ABA has an equally well-established concern that the death penalty be enforced with appropriate procedural protections and in a fair and unbiased fashion, and in a manner that minimizes the risk that innocent persons may be executed. In 1986, the ABA founded

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[3] These publications include:

- Starting in 1961, the ABA issued several editions of *The Mentally Disabled and the Law*, a comprehensive and detailed overview of state laws in a wide variety of areas affecting people with mental disabilities, including criminal justice issues.
- In 1973, the ABA formed its Commission on Mental and Physical Disability Law (now known as the Commission on Disability Rights) which, since 1976, has published the *Mental & Physical Disability Law Reporter*, a widely respected journal in the field of disability law.
- In the early 1980s, in collaboration with disability and clinical professional organizations, the ABA conducted an interdisciplinary study of criminal justice issues affecting defendants with mental disabilities, resulting in the *Criminal Justice Mental Health Standards*, which were subsequently incorporated into the *ABA Standards for Criminal Justice*.
- In 1982, the ABA published *Disabled Persons and the Law: State Legislative Issues*, which included proposed model statutes for the states, with particular attention to individuals with mental retardation.

the ABA Death Penalty Representation Project to provide training and technical assistance to judges and lawyers in death penalty jurisdictions.[4] And, in 1989, the ABA adopted policy stating "that no person with mental retardation, as now defined by the American Association on Mental Retardation, should be sentenced to death or executed." ABA Policy No. 110 (adopted Feb. 1989).[5] This definition was: "Mental retardation refers to significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period."[6] The ABA reaffirmed this position in 1997, when it adopted policy supporting a suspension of executions until states had implemented a number of reforms, including "preventing execution

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[4] Information on the ABA Death Penalty Representation Project may be found at: http://www.americanbar.org/groups/committees/death_penalty_representation.html.

[5] ABA House of Delegates Resolution 110 (1989), *available at* http://www.americanbar.org/content/dam/aba/directories/policy/1989_my_110.authcheckdam.pdf. ABA policy must be adopted by vote of the ABA's House of Delegates ("HOD"). Today, the HOD includes more than 560 delegates representing states and territories, state and local bar associations, affiliated organizations, ABA sections and divisions, and the Attorney General of the United States, among others. *See* ABA Leadership, House of Delegates, General Information, *available at* http://www.americanbar.org/groups/leadership/house_of_delegates.html.

[6] ABA House of Delegates Resolution 110 (1989), *supra* note 5 (quoting American Association on Mental Retardation, CLASSIFICATION IN MENTAL RETARDATION 1 (H. Grossman ed., 1983)).

of mentally retarded persons." ABA Policy No. 107 (adopted Feb. 1997).[7]

Following this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), the ABA:

- In 2003, revised the *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* ("*ABA Guidelines*"), to emphasize the importance for counsel working with mental disability professionals to understand potential issues of mental retardation, and to collect, develop and present evidence regarding the client's mental retardation, cognitive limitations and learning disabilities, which are relevant to potential defenses;[8]
- In 2003, published *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, which included model legislation

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[7] ABA House of Delegates Resolution 107 (1997), *available at* http://www.americanbar.org/content/dam/aba/directories/policy/1997_my_107.authcheckdam.pdf.

[8] *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, 1989, *available at* http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Standards/National/1989Guidelines.authcheckdam.pdf; *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, 2003 revisions, *available at* http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Standards/National/2003Guidelines.pdf. The *ABA Guidelines* were first adopted in 1989 to "amplify previously adopted Association positions on effective assistance of counsel in capital cases," and to "enumerate the minimal resources and practices necessary to provide effective assistance of counsel." *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, 1989.

showing how states could implement the *Atkins* decision;[9]

- In 2003, established, through its Section on Individual Rights and Responsibilities ("IR&R"), the Task Force on Mental Disability and the Death Penalty ("Task Force"), which was composed of 24 lawyers and mental health practitioners and academics, including members of the American Psychiatric Association and the American Psychological Association, to examine the imposition of the death penalty on persons with mental retardation and other mental, psychological, or psychiatric conditions and limitations;[10]
- In 2006, adopted as policy the conclusion of IR&R's Task Force that defendants "should not be executed or sentenced to death if, at the time of the offense, they had significant limitations in both their intellectual functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation . . . ;"[11] and
- Between 2006 and 2013, through the ABA's Death Penalty Due Process Review Project,

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[9] James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 MENTAL & PHYSICAL DISABILITY L. REP. 11, 13 (2003), *available at* www.deathpenaltyinfo.org/documents/MREllisLeg.pdf.

[10] *See* ABA House of Delegates Resolution 122A (2006), *available at* http://www.americanbar.org/content/dam/aba/directories/policy/2006_am_122a.authcheckdam.pdf (adopting the Task Force's proposal).

[11] *Id.*

> conducted assessments of the operation of the death penalty in twelve states, including Florida, that together represent almost 65% of the executions that have been carried out since *Gregg v. Georgia*, 428 U.S. 123 (1976). These assessments include analyses of whether a state has implemented procedures and properly trained counsel to determine whether a capital defendant or death row inmate has mental retardation and thus cannot be subject to the death penalty.[12]

Based on these and other examinations by the ABA of the issues involved in the application of the death penalty to individuals with mental retardation, the ABA submits this *amicus* brief to assist the Court in considering whether Florida has established a constitutionally reliable test for determining whether a defendant who has asserted mental retardation should nevertheless be eligible for the death penalty.

SUMMARY OF ARGUMENT

In *Atkins*, this Court concluded that a national consensus had developed against the execution of persons with mental retardation and that such executions violated the Eighth Amendment. The Court also stated that the national consensus suggests that some characteristics of mental retardation, such as disabilities in the areas of reasoning, judgment, and control of impulses, undermine the procedural protections of our capital punishment jurisprudence and can jeopardize the reliability and fairness of

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[12] A copy of all assessments may be found at: http://www.americanbar.org/groups/individual_rights/projects/death_penalty_due_process_review_project/death_penalty_assessments.html.

capital proceedings against defendants with mental retardation.

Although the *Atkins* Court left to the states the task of determining whether a defendant has mental retardation, the Court noted its approval of state statutory definitions that generally conform to the clinical definitions of professional mental disability organizations, such as the American Association on Intellectual and Developmental Disabilities (AAIDD) (formerly the American Association on Mental Retardation (AAMR)) and the American Psychiatric Association (APA).[13]

In the eleven years since *Atkins* was decided, states have taken differing approaches to fulfilling this mandate. Many of these states have followed *Atkins*' guidance and have implemented tests that, consistent with the definitions used by recognized mental disability organizations, consider assessments of both an individual's intellectual functioning (*i.e.*, IQ tests), including the standard margin of error or specific facts about the administration and scoring of the test, and an individual's conceptual, social and practical skills.

Florida courts, however, have adopted a test that individuals who have a raw IQ score above 70 do not have mental retardation, without consideration of the standard margin of error or factors including cognitive and behavioral impairments that are encompassed in the definitions of mental disability professionals. In

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[13] The AAIDD defines mental retardation as "a disability characterized by significant limitations in both intellectual functioning and in adaptive behavior, which covers many everyday social and practical skills." *Definition*, AAIDD, *available at* http://aaidd.org/intellectual-disability/definition#.UrJVfNJDs2c.

doing so, Florida has erected a test with no foundation in scientifically recognized definitions that prevents an accurate assessment of whether a defendant has mental retardation and allows for the execution of individuals with mental retardation who would not be executed in states that have followed *Atkins*' guidance. This, the ABA asserts, is an arbitrary and capricious application of the death penalty that denies the constitutional protection mandated by *Atkins* for the full range of defendants with mental retardation.

ARGUMENT

FLORIDA SHOULD NOT BE PERMITTED TO UNDERMINE *ATKINS V. VIRGINIA* BY ERECTING A TEST THAT PREVENTS ACCURATE ASSESSMENT OF A DEFENDANT'S MENTAL RETARDATION.

A. The Rights of Defendants with Mental Retardation Warrant the Utmost Constitutional Protection.

In *Atkins*, the Court held that the execution of defendants with mental retardation violated the Eighth Amendment and that "the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." 536 U.S. at 321 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)). This holding was based on a "national consensus" against the execution of these defendants, which provided "powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal." *Id.* at 316. In addition, the Court was "not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty." *Id.* at 321. As the Court

explained, "[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution." *Id.* at 319. And, "the same cognitive and behavioral impairments that make these defendants less morally culpable" make it less likely that the possibility of execution will act as a deterrent. *Id.* at 320.

In addition, the Court stated that the national consensus "suggests that some characteristics of mental retardation undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards." *Id.* at 317. These characteristics, such as "disabilities in the areas of reasoning, judgment, and control of their impulses," moreover, "can jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants." *Id.* at 306-07.

The ABA respectfully asserts that any defendant claiming mental retardation should be entitled to establish "the lesser culpability of the mentally retarded offender," *id.* at 319, pursuant to a constitutionally appropriate test that evaluates both the defendant's level of intellectual functioning and his or her conceptual, social and practical adaptive skills. As is well established in the legal literature and by the ABA's work in this field, defendants with mental retardation may:

- mask their disability, making it difficult for counsel to realize that the client is an individual with mental retardation;[14]

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[14] *See, e.g.*, *ABA Guidelines*, Guideline 10.5 ("Relationship with the Client"), Commentary at 1009 n.183 (overcoming barriers to

- find it difficult to recall information that will aid counsel, or have difficulty answering open-ended questions;[15]
- act as if they understand their attorneys, adapt responses in favor of what they believe attorneys want them to say, or provide answers that are unrelated to the actual facts of the crime;[16] and

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communication and establishing rapport with defendant are critical to effective communication and to obtain vital information, an important example of which is the fact that the client is mentally retarded – a fact that the client may conceal with great skill, but one which counsel absolutely must know) (citing James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 430-31 (1985) and *Atkins*, 536 U.S. at 321). *See also* Denis W. Keyes et al., *Mitigating Mental Retardation in Capital Cases: Finding the "Invisible" Defendant*, 22 MENTAL & PHYSICAL DISABILITIES L. REP. 529, 531 (1998); Richard J. Bonnie, *The Competency of Defendants with Mental Retardation to Assist in Their Own Defense*, in THE CRIMINAL JUSTICE SYSTEM AND MENTAL RETARDATION 97, 99-100 (Ronald W. Conley, et al., eds., 1992).

[15] *See* Ellis & Luckasson, *supra* note 14, at 428-29. ("Because few mentally retarded people are able to determine what information might have legal significance for their case, spontaneous memory and cursory questioning cannot reliably ascertain all the facts."); *see also* Robert Perske, UNEQUAL JUSTICE 15-16 (1991).

[16] *See* Ellis & Luckasson, *supra* note 14, at 428-29. ("Clients with mental retardation tend to act as though they understand their attorneys when they do not, and to bias their responses in favor of what they believe their attorneys want them to say in the direction of concrete, though inaccurate, responses.").

- be unable to monitor defense counsel's performance or involve themselves in the defense strategy, as they do not comprehend the criminal justice process.[17]

Florida's test does not provide adequate protection against any of these risks to the procedural protections of our capital jurisprudence or to "the reliability and fairness of capital proceedings against mentally retarded defendants." *Id.* at 306-07. As discussed below, Florida's assumption that a defendant with severe social, cognitive, or behavioral impairments is capable of meaningfully participating in his or her defense solely because he or she has an IQ test result above 70 is scientifically unjustifiable and results in an arbitrary and capricious application of the death penalty.

B. Florida's Test Undermines *Atkins*.

In *Atkins*, the Court left to the "[s]tates the task of developing appropriate ways to enforce the constitutional restriction" on execution of those who suffer from mental retardation. 536 U.S. at 317. The Court, however, did not suggest that states could undermine *Atkins* through the use of tests that do not comport with scientific consensus, and accordingly, do not afford the protection of the Eighth Amendment to

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[17] *See* Richard J. Bonnie, *The Competence of Criminal Defendants with Mental Retardation to Participate in Their Own Defense*, 81 J. CRIM. L. & CRIMINOLOGY 419, 423 (1990) ("fairness of adjudication in most cases involving defendants with mental retardation depends largely on the ability and inclination of the attorney to recognize and to compensate for the client's limitations" and "the risks of inadequate representation are magnified when the client has mental retardation . . . because the client is in no position to monitor the attorney's performance even in a superficial way").

the full range of individuals with mental retardation. Untethered from scientifically accepted definitions of mental retardation, Florida's test results in individuals with mental retardation in Florida being excluded from constitutional protection properly afforded to them in other jurisdictions.

1. Florida's Test Ignores *Atkins*' Guidance on the Use of Scientifically Accepted Definitions of Mental Retardation.

Implicit in the Court's delegation to the states was the Court's guidance that "[t]he statutory definitions of mental retardation are not identical, but generally conform to the clinical definitions set forth [by the AAMR (now the AAIDD) and the APA]." *Id.* at 317 n.22 (citing *id.* at 309 n.3). These "clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction . . . ." *Id.* at 318.

In the eleven years since *Atkins*, the vast majority of states have implemented rules that are consistent with the definitions used by mental disability professionals in considering a defendant's intellectual functioning. Many states, for example, allow courts to consider the standard margin of error or specific facts about the administration and scoring of IQ tests.[18] A

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[18] For example, the Supreme Court of Tennessee has held that a defendant's raw IQ test scores are not to be treated at "face value" and has permitted defendants to introduce evidence regarding these scores, including margins of error. *See Coleman v. State*, 341 S.W.3d 221, 242, 247 (Tenn. 2011). *See also State v. Pruitt*, 2013 WL 5530772, at *17 (Tenn. 2013) (stating that experts may testify to the AAIDD recognized "challenges to the reliability and validity of I.Q. test scores, among which are the

number of other states have recognized that a conclusion regarding whether an individual has mental retardation requires a multi-faceted analysis.[19] As the Pennsylvania Supreme Court stated in *Commonwealth v. Miller*, 888 A.2d 624, 631 (Pa. 2005), "[i]t is the interaction between limited intellectual functioning and deficiencies in adaptive skills that establish mental retardation."

In contrast, Florida's test relies only on a raw IQ score and ignores both the standard margin of error and the relevant scientific evidence of mental retardation (such as adaptive skills) that are included

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standard error of measurement, the Flynn Effect, and the practice effect."). Similarly, the Supreme Court of Indiana considered both margins of error associated with a defendant's tests and expert testimony regarding the test's administration. *State v. Pruitt*, 834 N.E.2d 90, 104-06 (Ind. 2005). Arizona's statutory definition of mental retardation similarly takes into account the "margin of error for the test administered." Ariz. Rev. Stat. Ann. § 13-753(K)(5).

[19] *See, e.g.*, *Rogers v. State*, 653 S.E.2d 31, 35 (Ga. 2007) (stating that "Georgia's statutory definition of mental retardation is consistent with the clinical definitions relied upon in *Atkins*" and that "there are no 'hypertechnical' requirements that a defendant have certain test scores in order to be found mentally retarded"); *Goodwin v. State*, 191 S.W.3d 20, 30 (Mo. 2006) (applying definition of mental retardation from DSM-IV in evaluating whether defendant had "significantly subaverage intellectual functioning"); *Commonwealth v. Miller*, 888 A.2d 624, 629-32 (Pa. 2005) (consistent with the AAIDD and APA definitions, court would "not adopt a cutoff IQ score for determining mental retardation in Pennsylvania, since it is the interaction between limited intellectual functioning and deficiencies in adaptive skills that establish mental retardation"); *State v. Lott*, 779 N.E.2d 1011, 1014 (Ohio 2002) (an IQ test is "one of the many factors that need to be considered" and alone is "not sufficient to make a final determination on the issue [of mental retardation]").

in the definitions adopted by mental disability organizations. With no foundation in scientifically recognized definitions, Florida's rigid test necessarily excludes individuals with mental retardation whom the Court expressly intended to receive constitutional protection.

This type of nullification has been rejected by this Court, which has held that this Court's decisions "can neither be nullified openly and directly by state legislators . . . nor nullified indirectly . . . through evasive schemes . . . ." *Cooper v. Aaron*, 358 U.S. 1, 17, 18 (1958). *See also Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the Judicial Department to say what the law is.").

2. By Preventing Accurate Assessment of a Defendant's Mental Retardation, Florida's Test Results in the Arbitrary and Capricious Imposition of Death Sentences.

Florida's failure to adopt a scientifically-based definition of mental retardation means that the same individual could be eligible for the death penalty in Florida, but not in another state that defines mental retardation in a scientifically valid manner.

Indeed, under Florida's test, the courts below were foreclosed from considering both Mr. Hall's IQ score as a range, based on the standard error of measurement, and his deficits in adaptive behavior, as set out in the definitions of the AAIDD and APA. Instead, they were required to consider only whether Mr. Hall's IQ score was below a bright-line cut-off of 70. *See Hall v. State*, 109 So.3d 704, 719-20 (Fla. 2012) (Perry, J.,

dissenting).[20] In contrast, in *State v. Gumm*, the Court of Appeals of Ohio affirmed the trial court's determination that a defendant successfully established mental retardation through expert evidence concerning the standard error of measurement, where the defendant had IQ test scores ranging between 67 and 79. 864 N.E.2d 133, 136-40 (Ohio Ct. App. 2006).[21]

While *Atkins* left the states leeway in determining mental retardation, Florida's rigid and unscientific test is not consistent with *Atkins*, nor is it consistent with basic notions of fairness. *See Pruitt v. State*, 834 N.E.2d 90, 108 (Ind. 2005) ("Although *Atkins* recognized the possibility of varying state standards of mental retardation, the grounding of the prohibition in the Federal Constitution implies that there must be at least a nationwide minimum. The Eighth Amendment must have the same content in all United States jurisdictions."); Lois A. Weithorn, *Conceptual Hurdles to the Application of Atkins v. Virginia*, 59 HASTINGS L.J. 1203, 1230 (2008) ("Rigid rules that result in arbitrary decisions—such as Florida's categorical refusal to consider the standard error of measurement-promote unfairness and undercut the public's trust in our system of justice."); *cf. Kennedy v.*

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[20] *See also* ABA, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment Report*, ABA DEATH PENALTY DUE PROCESS REVIEW PROJECT 368 (Sept. 2006), *available at* http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/florida/report.authcheckdam.pdf.

[21] *See also* ABA, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Ohio Death Penalty Assessment Report*, ABA DEATH PENALTY DUE PROCESS REVIEW PROJECT 371-72 (Sept. 2007), *available at* http://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/ohio_chapter13.authcheckdam.pdf.

Louisiana, 554 U.S. 407, 447 (2008) (discussing the need to avoid "arbitrary and capricious application" of the death penalty).

This Court's holding in *Atkins* is clear—the execution of an individual with mental retardation violates the Eighth Amendment. 536 U.S. at 321. As results from the ABA's Death Penalty Due Process Review Project—and this case—have shown, however, *Atkins*' holding has not guaranteed that individuals with mental retardation will not unlawfully be found eligible for the death penalty when a state's definition of mental retardation is not in accord with scientific understanding of mental retardation.[22] In disregarding *Atkins*' guidance concerning the definitions used by recognized mental disability organizations in determining whether an offender has mental retardation, Florida has erected a test that prevents accurate assessment and poses the grave—and unacceptable—risk that individuals with mental retardation will be unconstitutionally executed. This, the ABA asserts, results in an arbitrary and capricious application of the death penalty that denies the constitutional protection mandated by *Atkins* for all defendants with mental retardation.

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[22] *See* ABA, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment Report*, *supra* note 20.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* the American Bar Association respectfully submits that the judgment of the Florida Supreme Court should be reversed.

Respectfully submitted,

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v.

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Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF *AMICI CURIAE* AMERICAN PSYCHOLOGICAL ASSOCIATION, AMERICAN PSYCHIATRIC ASSOCIATION, AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW, FLORIDA PSYCHOLOGICAL ASSOCIATION, NATIONAL ASSOCIATION OF SOCIAL WORKERS, AND NATIONAL ASSOCIATION OF SOCIAL WORKERS FLORIDA CHAPTER IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI*[1]

The American Psychological Association is a scientific and educational organization dedicated to increasing and disseminating psychological knowledge; it is the world's largest professional association of psychologists. Among the Association's major purposes is to increase and disseminate knowledge regarding human behavior, and to foster the application of psychological learning to important human concerns. The Association's Division of Intellectual and Developmental Disabilities endeavors to advance the treatment of intellectual and developmental disabilities, based on scientific inquiry and high standards of practice. The Association's Division of Neuropsychology, in collaboration with other national neuropsychology organizations (National Academy of Neuropsychology, American Board of Clinical Neuropsychology and their Academy, and the American Board of Clinical Neuropsychology) works to advance the understanding and treatment of brain conditions affecting intellectual development and disability, based on scientific inquiry and high standards of practice.

The Florida Psychological Association is a voluntary, member-based, professional organization comprised of psychologists. With over 1,500 members, it is the largest professional organization for

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[1] This brief was written by counsel for amici, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief. Both parties have given written consent to the filing of this brief.

psychologists in the state of Florida. Its mission is, in part, to advance scientific interests and inquiry and the application of research findings to the promotion of health and public welfare.

The American Psychiatric Association, with more than 36,000 members, is the Nation's leading organization of physicians who specialize in psychiatry. Its member physicians work to ensure humane care and effective treatment for all persons with mental disorders, including intellectual disabilities. Association members engage in treatment, research, and forensic activities, and many of them regularly perform roles in the criminal justice system. The American Psychiatric Association and its members have substantial knowledge and experience relevant to the issues in this case. In 2013, the American Psychiatric Association published the Fifth Edition of its Diagnostic and Statistical Manual ("DSM-5"). DSM-5 provides a new definition for intellectual disability (intellectual developmental disorder) based on expert consensus, review of the scientific literature, and contributions from other professional societies.

Amicus American Academy of Psychiatry and the Law, with approximately 2000 psychiatrist members dedicated to excellence in practice, teaching, and research in forensic psychiatry, has participated as an *amicus curiae* in, among other cases, *Brown v. Plata*, 131 S. Ct. 1910 (2011); *Indiana v. Edwards*, 554 U.S. 164 (2008); *Clark v. Arizona*, 548 U.S. 735 (2006); and *Penry v. Johnson*, 532 U.S. 782 (2001).

The National Association of Social Workers ("NASW") is a professional membership organization

with 145,000 social workers in chapters in every State, the District of Columbia and internationally. The NASW Florida Chapter has approximately 5,300 members. Since 1955, NASW has worked to develop high standards of social work practice while unifying the social work profession. NASW promulgates professional policies, conducts research, publishes professional studies and books, provides continuing education and enforces the *NASW Code of Ethics*.

The issue at the heart of this case — the identification of individuals with intellectual disability — has been the subject of significant research by psychologists and psychiatrists. Amici submit this brief to present relevant scientific knowledge that can provide context for the Court's review of whether Florida's system for identifying defendants with intellectual disability in capital cases violates the Eighth Amendment and this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002).

SUMMARY OF ARGUMENT

In *Atkins v. Virginia*, this Court held that the Eighth Amendment prohibits the execution of offenders with intellectual disability.[2] 536 U.S. 304, 321

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[2] While the term "mental retardation," was used by the parties and the Court in *Atkins*, the preferred clinical term now is "intellectual disability." *See* Am. Ass'n on Intellectual & Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Support* 3 (11th ed. 2010) (hereinafter, "AAIDD Manual"). DSM-5 refers to "intellectual disability (intellectual developmental disorder)" to indicate that the condition is a mental disorder and a medical condition. Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 33 (5th ed.

(2002). This Court's decision was grounded in the evolving national consensus that the execution of those with intellectual disability undermines both "the penological purposes served by the death penalty" and "the strength of the procedural protections" guarded by this Court's capital jurisprudence. *Id.* at 317. That consensus reflects an understanding that offenders with intellectual disability have certain impairments — such as "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others" — that make them less morally culpable and place them at a heightened risk of wrongful execution. *Id.* at 318, 320–21.

These impairments are tied directly to the clinical definition of intellectual disability, which this Court recognized requires a diagnosis of significant limitations in general intellectual functioning, significant limitations in adaptive skills, and onset before adulthood. *Id.* at 308 n.3, 318. While the Court incorporated that definition into the *Atkins* decision, *see id.*, it also left to the states the task of determining which defendants are "so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." *Id.* at 317. This approach has led to inconsistency among the states in determining which defendants are within the class of offenders for

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2013) (hereinafter, "DSM-5"). Note also that Congress has enacted "Rosa's Law," which replaces the term "mental retardation" with "intellectual disability" throughout the U.S. Code and Code of Federal Regulations. Pub. L. No. 111-256, 124 Stat. 2643 (2010).

which the Eighth Amendment prohibits capital punishment. *See Hall v. State*, 109 So. 3d 704, 714–15 (Fla. 2012) (Pariente, J., concurring) (summarizing different procedures used by the states for identifying defendants with intellectual disability). In the instant case, the state of Florida uses a "firm cutoff" requiring an IQ score of 70 or below to meet the first prong of the diagnostic criteria for intellectual disability. *Id.* at 707.

Although the states have diverged in their methods for diagnosing intellectual disability in capital defendants,[3] there is no such divergence in the mental health community. In assessing whether an individual meets the clinical definition of intellectual disability, there is a unanimous consensus among the mental health professions that accurate diagnosis requires clinical judgment based on a comprehensive assessment of all three criteria: general intellectual functioning, adaptive functioning, and age of onset.

First, a valid diagnosis requires comprehensive assessment of adaptive behavior in conceptual, social, and practical contexts as well as general intellectual functioning. The existence of concurrent deficits in intellectual and adaptive functioning is central to the diagnosis of intellectual disability, and evaluation of adaptive skills is what allows for an accurate diagnosis. Furthermore, because deficits in adaptive functioning — such as the ability to engage in logical reasoning,

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[3] *See, e.g.*, David DeMatteo, et al., "*A National Survey of State Legislation Defining Mental Retardation: Implications for Policy and Practice After* Atkins," 25 Behav. Sci. L. 781, 785–88 (2007) (surveying state methods for defining intellectual disability).

control impulses, understand and process information, and abstract from mistakes and learn from experience — contribute significantly to the rationales of reduced culpability and risk of wrongful execution that support the *Atkins* decision, their evaluation must be a part of any reliable diagnosis in a capital case.

Second, while evaluation of general intellectual functioning customarily includes the use of individually administered, comprehensive, standardized IQ tests with a contemporary and nationally representative norm or reference sample,[4] it is improper clinical practice to use only an IQ test score cutoff to assess general intellectual functioning or to make a determination that a person does not have an intellectual disability. This is so for several reasons. Among them is that every standardized test score has a "standard error of measurement" ("SEM") that reflects the reliability (precision) of scores from the test. The SEM is the variation around a so-called "true score," which is the score that would be obtained if the test had perfect reliability. The SEM is calculated from the statistically determined reliability of each test score provided — specifically in this case, the IQ test score. The SEM, in turn, allows calculation of a range of scores (typically ± 5 IQ points), or "confidence interval," within which clinicians can say that the person's true IQ score lies with 95% confidence. Reporting an

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[4] *See* DSM-5 at 37 ("Intellectual functioning is typically measured with individually administered and psychometrically valid, comprehensive, culturally appropriate, psychometrically sound tests of intelligence.").

individual's IQ score without identifying the SEM conveys a misleading sense of precision and reliability and is not in line with standards of practice. In general, failure to administer a test or interpret test results properly may distort results from a particular test.[5]

In sum, intellectual disability cannot be diagnosed or its diagnosis ruled out through exclusive reliance on an IQ test score. Nor can general intellectual functioning be assessed by an IQ test score without taking into account the limitations of IQ testing. Intellectual disability cannot be reliably or accurately diagnosed without an evaluation of an individual's adaptive functioning in conjunction with the individual's general intellectual functioning and age of onset. A state's failure to follow the correct diagnostic approach violates the professional consensus on diagnosing intellectual disability and, in turn, creates an unacceptable and significant risk that offenders with intellectual disability will be executed in violation of the Eighth Amendment and this Court's decision in *Atkins*.

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[5] *See* DSM-5 at 37 ("Factors that may affect test scores include practice effects and the 'Flynn effect' (*i.e.*, overly high scores due to out-of-date test norms). Invalid scores may result from the use of brief intelligence screening tests or group tests; highly discrepant individual subtest scores may make an overall IQ score invalid.")

ARGUMENT

I. There Is Unanimous Professional Consensus That the Diagnosis of Intellectual Disability Requires Comprehensive Assessment and the Application of Clinical Judgment.

As the Court recognized in *Atkins*, intellectual disability is not just low intelligence, but rather a diagnosis that requires a clinical assessment of a person's functioning in everyday life. *See* 536 U.S. at 308 n.3. The Court cited the definitions of intellectual disability from the American Psychiatric Association and the American Association on Mental Retardation (now known as the American Association on Intellectual and Developmental Disabilities ("AAIDD")). *Id.* (citing *Mental Retardation: Definition, Classification, and Systems of Supports* 5 (9th ed. 1992) and *Diagnostic and Statistical Manual of Mental Disorders* 41 (4th ed. 2000)). These diagnostic manuals, along with their most recent revisions, reflect the professional consensus regarding the diagnosis of intellectual disability.

The accepted clinical definitions[6] of intellectual disability include three criteria: (a) significant limitations in general intellectual functioning; (b) significant limitations in adaptive functioning; and (c) age of onset. *See* Am. Ass'n on Intellectual & Developmental Disabilities, *Intellectual Disability:*

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[6] The AAIDD Manual and DSM-5 definitions of intellectual disability differ in some particulars not relevant for the purposes of this brief or the question presented to the Court in this case. There is agreement about the central points made here.

Definition, Classification, and Systems of Support 27 (11th ed. 2010) (hereinafter, "AAIDD Manual"); Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 33 (5th ed. 2013) (hereinafter, "DSM-5").[7]

Although all three criteria must be present for diagnosis of intellectual disability, the criteria do not represent disjunctive inquiries. The significant limitations in general intellectual functioning and adaptive functioning must be evaluated in conjunction and by a mental health professional exercising his or her clinical judgment — "judgment rooted in a high level of clinical expertise and experience."[8] This evaluation cannot be limited to a review of IQ test scores because without further clinical assessment, it cannot be known what impairments in adaptive functioning the person experiences or what other clinical indicators of impaired general intellectual functioning exist. *See* DSM-5 at 37 ("The diagnosis of intellectual disability is based on both clinical

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[7] The Court in *Atkins* relied on earlier versions of both the AAIDD Manual and the DSM. The three criteria necessary for diagnosis remain unchanged. *See infra* 13-14 (describing the changes in DSM-5).

[8] AAIDD Manual at 85 (clinical judgment "emerges directly from extensive data and is based on training, experiences, and specific knowledge of the person and his or her environment"); *see also* Robert L. Shalock & Ruth Luckasson, *Clinical Judgment* 1 (AAMR 2005) (clinical judgment is "characterized by its being systematic (*i.e.*, organized, sequential, and logical), formal (*i.e.*, explicit and reasoned), and transparent (*i.e.*, apparent and communicated clearly)" (cited in AAIDD Manual at 86)).

assessment and standardized testing of intellectual and adaptive functions."); AAIDD Manual at 35 (emphasizing that "significant limitations in intellectual functioning is only one of the three criteria used to establish a diagnosis of [intellectual disability]"). Clinical judgment is rooted in objective criteria and multiple sources of data, including school records and behavioral rating scales.[9]

A. Comprehensive assessment requires concurrent analysis of intellectual and adaptive functioning.

A comprehensive assessment must be "based on multiple data points" that "include giving equal consideration to significant limitations in adaptive behavior and intellectual functioning." AAIDD Manual at 28.[10] Because adaptive skills — such as abstract

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[9] Evaluation of adaptive functioning faces challenges including obtaining records and information from those with knowledge of the individual's functioning over time, and the potentially misleading nature of a defendant's functioning in the highly structured environment of a prison, where there is no need to make the types of decisions that are part of ordinary life outside of prison. *See* Marc J. Tassé, *Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases*, 16 Applied Neuropsychology 114, 119 (2009) ("The ideal respondents are individuals who have the most knowledge of the individual's everyday functioning across settings. . . .").

[10] Because Florida's use of a fixed IQ score cutoff is not tied directly to the evaluation of age of onset, this brief focuses on the need for a comprehensive clinical assessment of intellectual and adaptive functioning. Determination of the onset of the individual's disability, however, should also be based on a comprehensive evaluation that includes consideration of materials

thinking, social judgment, regulating emotion, and resisting manipulation by others — are crucial to an individual's ability to live independently and function within the boundaries of social norms, *see* DSM-5 at 33–34, the assessment of those skills is necessary to interpret the evaluation of an individual's general intellectual functioning and to arrive at a valid diagnosis overall.

The existence of concurrent deficits in intellectual and adaptive functioning has long been the defining characteristic of intellectual disability. Individuals are usually identified in the first instance as potentially having an intellectual disability by impairments in their adaptive behavior, such as difficulty functioning in everyday tasks.

Historically, those observations were the sole basis for identifying and classifying people with disabilities. Individuals with intellectual disability were identified by their communities "because they failed to adapt socially to their environment." AAIDD Manual at 5. Then, with the development of the first standardized intelligence tests resulting in an IQ score in the early 1900s, there was a brief shift to reliance on IQ tests "as an efficient and objective means to distinguish individuals with [intellectual disability] from the general population." *Id.* at 43. Despite this initial embrace, however, "dissatisfaction with the IQ score as the sole indicator of ID emerged over time," as

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such as school records, medical records, psychiatric records, and reports from persons who have long familiarity with the defendant. *See* AAIDD Manual at 94–96.

scientists and professionals realized that IQ testing "only provided a narrow measure of intellectual functioning related to academic tasks . . . thus ignoring important aspects of intellectual functioning that included social and practical skills." *Id.* at 43–44.

To account for the limitations of IQ testing, the professional community began developing the comprehensive, multi-criteria analysis that is used today. Although impaired adaptive functioning has always been the most noticeable symptom of intellectual disability, the 1959 AAIDD Manual was the first diagnostic guide to provide a clinical definition for the concept of adaptive behavior, defining it as "the degree to which the individual is able to function and maintain himself independently" and "the degree to which he meets satisfactorily the culturally-imposed demands of personal and social responsibility." *Id.* at 44 (quotation marks omitted).[11] Adaptive behavior has been included in the diagnostic criteria for intellectual disability in each subsequent edition of the manual. *See id.* at 8 (summarizing the definitions used in each edition). Similarly, since 1968 each edition of the DSM has defined intellectual disability as subaverage intellectual functioning that is either "associated with," "resulting in," or "accompanied by" impairments in adaptive behavior. *See id.* at 8–9 (summarizing the definitions of DSM-II, DSM-III, DSM-III-R, DSM-IV, and DSM-IV-TR).

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[11] At that time, the AAIDD was known as the American Association on Mental Deficiency, the predecessor organization to the American Association on Mental Retardation and the AAIDD.

As diagnostic methods have been refined in each subsequent edition of these manuals, there has been a steady trend towards emphasizing the importance of clinical assessment of intellectual and adaptive functioning and decreasing reliance on IQ tests. In previous editions of the AAIDD and DSM manuals, this trend has been demonstrated by inclusion of the standard error of measurement (and resulting confidence interval) when using IQ tests as a means of assessing general intellectual functioning. *See id.* at 8–11 (summarizing the shifts in definition over time).

Since *Atkins* was decided, this trend has culminated in the publication of the DSM-5. The DSM-5 demonstrates the increased importance of adaptive functioning in the diagnosis of intellectual disability (and the corresponding decreased emphasis on standardized IQ tests) in two ways. First, the manual expressly states that diagnosis should be "based on *both* clinical assessment and standardized testing of intellectual and adaptive functions," indicating that exclusive reliance on standardized tests is inappropriate. DSM-5 at 37 (emphasis added).

Second, the DSM-5 is the first edition of the DSM that classifies levels of severity in intellectual disability according to adaptive functioning rather than IQ score. *See* DSM-5 at 33–36. The manual explains that "[t]he various levels of severity are defined on the basis of adaptive functioning, and not IQ scores, because it is adaptive functioning that determines the levels of supports required." *Id.* at 33. In other words, the DSM-5 recognizes that adaptive functioning has greater practical significance because it is a better

indicator of the individual's ability to function appropriately in society.

B. The existence of concurrent deficits in intellectual and adaptive functioning is central to the rationale of the *Atkins* decision.

The concurrent existence and requirement for deficits in both intellectual functioning and adaptive functioning are also reflected in the *Atkins* decision itself. When discussing the impairments that diminish the personal culpability of offenders with intellectual disability and place them at a special risk of wrongful execution, this Court highlighted several specific deficits: "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Atkins*, 536 U.S. at 318. The Court also noted that individuals with intellectual disabilities "often act on impulse rather than pursuant to a premeditated plan," and "in group settings they are followers rather than leaders." *Id.*

These criteria, related to impaired adaptive functioning, are especially important to the "[t]he risk 'that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'" *Atkins*, 536 U.S. at 320 (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)). Clinical deficits in communication, regulating emotion, and resisting manipulation by others can contribute to "the possibility of false confessions," "the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation," less ability to serve as an

effective witness and "give meaningful assistance to their counsel," and the risk that the demeanor of individuals with intellectual disability "may create an unwarranted impression of lack of remorse for their crimes." *Id.* at 320-21. The importance of adaptive functioning to this Court's decision in *Atkins* thus underscores the need for a comprehensive assessment that includes these criteria in every capital case in which a defendant manifests or claims to have intellectual disability.

C. A system for identifying defendants with intellectual disability that does not include analysis of adaptive functioning is based on a fundamental misunderstanding of the diagnostic criteria.

Florida's use of a fixed IQ score cutoff to identify defendants with intellectual disabilities goes against the unanimous professional consensus by treating intellectual and adaptive functioning as sequential and disjunctive inquiries. In the present case, for example, the Supreme Court of Florida explained that because "the failure to establish any one element" of intellectual disability will "end the inquiry," it was proper for the lower court to limit Hall's introduction of evidence of his adaptive functioning "after he failed to establish the requisite IQ" of 70 or below. *Hall*, 109 So. 3d at 710. That holding conflicts with the generally accepted professional standard for diagnosis.

Contrary to the Florida court's determination, the relevant clinical authorities all agree that an individual with an IQ score above 70 may properly be diagnosed with intellectual disability if significant limitations in

adaptive functioning also exist. DSM-5 at 37; AAIDD Manual at 35, 39–40. As the DSM-5 explains, "IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks." DSM-5 at 37. "For example, a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person's actual functioning is comparable to that of individuals with a lower IQ score." *Id.*; *see also* AAIDD Manual at 40 ("It must be stressed that the diagnosis of ID is intended to reflect a clinical judgment rather than an actuarial determination. A fixed point cutoff score for ID is not psychometrically justifiable.").

Thus, the decision to "end the inquiry" and preclude any evidence of limitations in adaptive functioning when a capital defendant scores above 70 on a standardized IQ test is the opposite of what is required by clinically accepted diagnostic methods. Instead, a thorough evaluation of adaptive functioning is crucial in that situation, because limitations in adaptive functioning among individuals with IQ scores in this range are what allow qualified professionals to make a clinically valid diagnosis of intellectual disability.

The facts of the instant case also provide a concrete example of why a comprehensive assessment is necessary. The opinion of the Florida Supreme Court indicates that at various points in his life, Mr. Hall achieved IQ scores of 60, 71, 73, and 80. *See Hall*, 109 So. 3d at 707 (discussing scores of 71, 73, and 80); *id.* at 718 (Perry, J., dissenting) (discussing a previous

assessment of Hall's IQ as 60). Although the record also indicates that Mr. Hall had a history of limitations in adaptive functioning, such as illiteracy, short-term memory problems, and age-inappropriate behavior in school, *see id.* at 718–19, the assessment of that information was not considered as part of his *Atkins* claim because he had achieved an IQ score over 70. *See id.* at 709-10. Under the universally accepted clinical standards for diagnosing intellectual disability, the court's determination that Mr. Hall is not intellectually disabled cannot be considered valid.

II. The Use of a Fixed IQ Score Cutoff To Assess Intellectual Functioning Violates the Professional Consensus and Clinical Norms of Mental Health Professionals For Additional Reasons.

A correctly administered standardized IQ test is one means of assessing general intellectual functioning in a comprehensive assessment of intellectual disability. Determining an individual's general intellectual functioning based on a fixed IQ cutoff score, however, is contrary to the mental health community's professional consensus and unjustified by the relevant clinical norms. The application of IQ test scores in this way is invalid, unreliable, and creates an unacceptable risk that a person with intellectual disability will be misdiagnosed.

A. IQ testing is one means of assessment used by clinicians to determine whether a person has sufficiently impaired intellectual functioning to be considered intellectually disabled.

General intellectual functioning is a multi-faceted concept. It consists of the ability to reason, make plans, solve problems, think abstractly, comprehend complex ideas, make judgments, and learn from instruction and experience. DSM-5 at 33, 37; AAIDD Manual at 31.

For purposes of diagnosing intellectual disability, a properly constructed and administered IQ test is customarily used. *See* DSM-5 at 37; AAIDD Manual at 31. In every case, clinical assessment is required in order to "interpret[] the obtained score in reference to the test's standard error of measurement, the assessment instrument's strengths and limitations, and other factors, such as practice effects, fatigue effects, and age of norms used[]." AAIDD Manual at 35; *see also* DSM-5 at 37 ("IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks."). It is fundamental to the diagnosis of intellectual disability that "[c]linical training and judgment are required to interpret test results and assess intellectual performance." DSM-5 at 37.

Against the background of clinical judgment, persons whose general intellectual functioning is "*approximately* two standard deviations below the mean" are considered significantly impaired. AAIDD Manual at 35 (emphasis added); *see also* DSM-5 at 37 (same). For IQ tests whose mean score is 100, a score

two standard deviations below is between 65-75.[12] DSM-5 at 37.

Clinical use of an IQ test score requires that the score be from the individualized administration of a reliable and valid comprehensive intelligence test that has been standardized on the general population.[13] The construction, administration, and interpretation of such IQ tests require psychometric expertise. *See generally* Am. Educ. Research Ass'n, *et al.*, *Standards for Educational and Psychological Testing* 1-6 (1999) ("APA Standards"); *see also* AAIDD Manual at 35 ("There are a number of challenges and psychometric issues related to the measurement of intelligence and the interpretation of IQ scores.").

The construction of valid and reliable IQ tests is a difficult endeavor.[14] Under the best of circumstances, testing is a tool that provides an approximation of

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[12] As discussed *infra* Part II.B, IQ test scores can only properly be identified as a confidence interval, not a single number. AAIDD Manual at 36.

[13] Validity and reliability are technical terms essential to the proper design of psychological tests. Validity "refers to the degree to which evidence and theory support the interpretations of test scores entailed by proposed uses of tests." American Educational Research Association, *et al.*, *Standards for Educational and Psychological Testing* 9 (1999) ("APA Standards"). Reliability "refers to the consistency of such measurements when the testing procedures is repeated on a population of individuals or groups." *Id.* at 25.

[14] *See generally* APA Standards at 37-48 (describing the process of developing educational and psychological tests).

cognitive functioning in various spheres. IQ tests are administered in a controlled setting and they do not take into account the actual life circumstances of the individual being assessed, the stresses of daily life, individual responses to varying challenges, and variations in emotional reactivity and resilience.

There are, however, three tests of adolescent and adult intelligence that are generally accepted for the diagnosis of intellectual disability: the Wechsler Adult Intelligence Scale – Fourth Edition ("WAIS-IV"); the Stanford-Binet Intelligence Scale – Fifth Edition ("SB5"); and the Woodcock Johnson Tests of Cognitive Ability.[15] Each of these tests satisfies the professional standards for validity and reliability required for their use in diagnosis of general intellectual functioning in persons being evaluated for intellectual disability.[16]

But even the results from standardized IQ tests that meet the professional norms for validity and reliability may prove flawed if the tests are either improperly administered or interpreted. Tests can fail to accurately assess a person's general intellectual functioning for a number of reasons, including, among

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[15] Caroline Everington & J. Gregory Olley, *Implications of* Atkins v. Virginia*: Issues in Defining and Diagnosing Mental Retardation*, 8 J. Forensic Psychol. Prac. 1, 7 (2008) (stating that "[o]nly individually administered global tests of intelligence are acceptable for diagnosis of mental retardation").

[16] Kevin S. McGrew, *Intellectual Functioning: Conceptual Issues, Determining Intellectual Disability in the Courts: Focus on Capital Cases* 6 (Ed Polloway ed. AAIDD, forthcoming in 2014) (on file with counsel of record).

others: conditions of testing, including lack of privacy or otherwise distracting environment; test fairness for those with "severely limited verbal abilities" or substantial cultural differences; and failing to address the "Flynn effect" (aka, test norm obsolescence), which identifies the steadily increasing average IQ scores that distort the accuracy of older test scores; and the "practice effect" for those whose scores have improved through repeated testing.[17] Finally, a full IQ test score is a composite of multiple subtests. When there is considerable variability in an individual's scores on particular subtests due to known clinical conditions (such as traumatic brain injury), the full scale IQ score may not be a valid measure of intellectual functioning.[18]

Despite these drawbacks and imperfections, both the AAIDD Manual and DSM-5 recognize that properly designed and administered IQ tests are one acceptable

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[17] AAIDD Manual at 36-38; *see also* Frank M. Gresham & Daniel J. Reschly, *Standard of Practice and Flynn Effect Testimony in Death Penalty Cases*, 49 Intellectual and Developmental Disabilities 131, 134-37 (2011); Gilbert S. MacVaugh & Mark D. Cunningham, Atkins v. Virginia: *Implications and Recommendations for Forensic Practice*, 37 J. Psychiatry & L. 131, 147-151 (2009).

[18] *See* Committee on Disability Determination for Mental Retardation, National Research Council, *Mental Retardation: Determining Eligibility for Social Security Benefits* at 4 (Daniel J. Reschly, Tracy G. Myers, and Christine R. Hartel, eds. 2002) ("Significant and meaningful variation among an instrument's respective part scores may indicate evidence of compromised validity for one or more of them (for example, a low verbal scale score for an individual with a suspected speech disorder), which in turn would threaten the validity of the composite IQ score.").

method of identifying limitations in general intellectual functioning. *See* AAIDD Manual at 31 ("Although far from perfect, intellectual functioning is currently best represented by IQ scores when they are obtained from appropriate, standardized and individually administered assessment instruments."); DSM-5 at 37. An essential aspect of the proper use of IQ test scores in the diagnosis of intellectual disability is to recognize and respect the limits of a score's usefulness.

B. IQ test scores used to diagnose limitations in intellectual functioning are subject to a standard error of measurement and the interpretation of IQ test scores must take the test's reliability into account.

IQ test scores, like the scores from all standardized educational and psychological evaluations, are subject to a variability that is external to the abilities of the test taker.[19] This variation reduces the reliability of the scores produced by the testing instrument because it reduces the confidence a clinician has that the score accurately reflects the test taker's true abilities.

The field of psychometrics — the study and practice of creating and testing psychological evaluation metrics — has provided a mathematical means to estimate the variability in results that would be present if it were practical to test a person 100, 200, or more times.[20] This

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[19] *See, supra Part II.A* (discussing how IQ tests can fail to accurately measure intellectual functioning).

[20] *See, e.g.*, Ross E. Traub & Glenn L. Rowley, *Understanding Reliability*, 10 Educ. Measurement: Issues & Prac. 171 (1991),

mathematical means relies on the use of standardized testing procedures and the development of methods to calculate a test's reliability (*i.e.*, the precision, consistency, and repeatability of the test score). Once an IQ test's reliability is calculated based on group data, a simple mathematical calculation produces an estimate of the average variability of the observed IQ scores expected across all persons taking the test.

The standard error of measurement ("SEM") quantifies "this variability and provide[s] a stated statistical confidence interval within which the person's true score falls." AAIDD Manual at 36. SEM is a unit of measurement: 1 SEM equates to a confidence of 68% that the measured score falls within a given score range, while 2 SEM provides a 95% confidence level that the measured score is within a broader range. For example, the average SEM for the WAIS-IV is 2.16 IQ test points and the average SEM for the Stanford-Binet 5 is 2.30 IQ test points (test manuals report SEMs by different age groupings; these scores are similar, but not identical, often due to sampling error). The SEM for these test scores is then used to calculate confidence intervals. Thus, a full scale IQ "score of 70 is most accurately understood not as a precise score but as a range of confidence with parameters of at least one standard error of measurement." AAIDD Manual at 224.

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available at http://ncme.org/linkservid/65F3B451-1320-5CAE-6E5A1C4257CFDA23/showMeta/0/ (explaining that "test reliability is about the relative consistency of test scores."); Alan S. Kaufman, *IQ Testing 101* (2009).

As explained above, it is standard psychometric practice to report the "estimates of relevant reliabilities and standard errors of measurement" when reporting a test score. APA Standards at 31 (quoting Standard 2.1); *see also* AAIDD Manual at 36 ("Reporting an IQ score with an associated confidence interval is a critical consideration underlying the appropriate use of intelligence tests and best practices; such reporting *must* be a part of any decision concerning the diagnosis of ID." (emphasis added)).

The use of a fixed IQ cutoff score fails to account for the associated confidence interval of a given test score. The AAIDD Manual is clear that its operational definition of "significant limitations in intellectual functioning" as IQ test scores two standard deviations below the mean "is *not* to specify a hard and fast cutoff point/score." AAIDD Manual at 35. Reporting the range within which the person's true score falls, rather than only a score, underlies both the appropriate use of intellectual and adaptive behavior assessment instruments and best diagnostic practices. "Such reporting *must* be a part of any decision concerning the diagnosis of [intellectual disability]." *Id.* at 36 (emphasis added).

The plus-or-minus range is inherent to the accuracy of IQ scores; the use of a fixed IQ cutoff score is to apply a false precision to the assessment of IQ and presents a significant risk that individuals with intellectual disability will be executed in violation of the Eighth Amendment. *Id.* at 39-40 ("It must be stressed that the diagnosis of ID is intended to reflect a clinical judgment rather than an actuarial determination. *A*

fixed point cutoff score for ID is not psychometrically justifiable." (emphasis added)); *see also* Stephen Greenspan & Harvey N. Switzky, *Lessons from the* Atkins *Decision for the Next AAMR Manual, in What is Mental Retardation?: Ideas for an Evolving Disability in the 21st Century* 279 (Harvey N. Switzky & Stephen Greenspan eds. 2006) (cited in AAIDD Manual at 40). Because there is inevitable uncertainty about the precise level of a person's IQ, additional information — and its synthesis by a clinician — is essential to the diagnosis of intellectual disability.

CONCLUSION

There is a unanimous consensus among the mental health professions that it is not valid to exclude a diagnosis of intellectual disability based solely on an IQ score above 70. Relying solely on an IQ score at any level presents a significant risk that individuals with intellectual disability will be executed in violation of the Eighth Amendment. Instead, the appropriate method of diagnosis in every case is a comprehensive assessment of the individual's adaptive and general intellectual functioning in order to interpret the IQ score and arrive at an accurate diagnosis.

For the foregoing reasons, the diagnosis of intellectual disability in capital cases should be based on a comprehensive assessment of intellectual and adaptive functioning, including the appropriate standard error of measurement and confidence interval associated with standardized tests.

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AMICUS CURIAE BRIEF

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v.

FLORIDA,
Respondent.

On Writ of Certiorari to the
Supreme Court of Florida

BRIEF OF THE STATES OF ARIZONA, ALABAMA, ARKANSAS, IDAHO, KANSAS, OKLAHOMA, SOUTH CAROLINA, TENNESSEE, AND UTAH, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

In *Atkins* v. *Virginia*, 536 U.S. 304 (2002), this Court held that the Eighth Amendment prohibits the execution of mentally retarded capital offenders. Citing evidence primarily consisting of State statutes (including the Florida statute at issue here), the Court found a nationwide consensus supporting the prohibition. The Court noted that, "[t]o the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded," and expressly "le[ft] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction." *Id.* at 317.

The question presented is whether the Eighth Amendment requires Florida to use a clinical definition of mental retardation, including incorporation of a "standard error of measurement" for intelligence tests, in determining which offenders are exempt from the death penalty under *Atkins v. Virginia*.

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INTEREST OF *AMICI CURIAE*

The state *amici curiae*, through their Attorneys General, respectfully submit this brief in support of Respondent. The States have a vital interest in the administration of criminal justice, particularly as applied to capital crimes committed against their citizens. And when the Court decided *Atkins*, it expressly "le[ft] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction" on executing mentally retarded offenders. 536 U.S. at 317.[1] This case tests the continuing validity of that mandate.

Petitioner maintains that the States have no role in defining the substantive criteria for determining whether an offender is mentally retarded and therefore falls within *Atkins*' compass. Rather, in Petitioner's view, the States must derive their substantive criteria for assessing mental retardation from the clinical standards and practices developed by leading mental health organizations, and any statute that does not strictly adhere to such standards violates the Eighth Amendment. A decision in favor of Petitioner, requiring States to adhere precisely to evolving and often contradictory clinical standards advanced by mental health organizations, would substantially impact important

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1. As both Petitioner and Respondent have noted, the terminology for describing the mentally impaired has shifted in recent years, and the term "intellectual disability" is now most commonly used. See Pet. Br. 1 n.1; Resp. Br. 1 n.1. To preserve consistency with Petitioner's and Respondent's briefs, as well as the decisions below, this Brief uses "mental retardation."

State interests in objective decision-making, administrable mental retardation standards in the context of capital punishment, and in finality and closure for the victims' families.

SUMMARY OF ARGUMENT

Petitioner's challenge to Florida's statutory scheme for assessing mental retardation claims turns on two premises. First, that *Atkins* allows States a very limited role in implementing the constitutional restriction on executing mentally retarded offenders. According to Petitioner, States must follow "accepted" clinical standards and practices developed by mental health organizations regarding the substantive criteria for determining mental retardation, and States have leeway only to develop appropriate procedures to administer these standards developed by others. Therefore, because Florida fails to strictly follow such "accepted" clinical practices, its law contravenes *Atkins* and the Eighth Amendment.

Second, Petitioner challenges the constitutionality of Florida's approach as an "outlier" among the States' respective approaches, suggesting that there is a national consensus contrary to Florida's framework for assessing mental retardation.

Neither premise withstands scrutiny.

Atkins did not outsource to mental health organizations the development of substantive criteria, consistent with the Eighth Amendment, for

determining mental retardation. *Atkins* expressly left that task to the States, in keeping with the Court's precedent that has "traditionally left to legislators the task of defining terms of a medical nature that have legal significance." *Kansas* v. *Hendricks*, 521 U.S. 346, 359 (1997).

Further, there is no "national consensus" contrary to Florida's approach for determining whether a defendant is mentally retarded. Rather, the States' frameworks for evaluating the "intellectual functioning" aspect of mental retardation, which is specifically at issue here, as well as the assessment of mental retardation more generally, are markedly varied—reflecting a continuum of criteria and often complex procedures. The actions undertaken by the various States to implement *Atkins*, which comprise the "clearest and most reliable objective evidence of contemporary values," directly refute Petitioner's claim that Florida's statute violates the Eighth Amendment. *Atkins*, 536 U.S. at 312 (internal quotation marks omitted).

ARGUMENT

I. *ATKINS* DOES NOT COMPEL STATES TO ADHERE STRICTLY TO MENTAL HEALTH ORGANIZATIONS' RECOMMENDED PRACTICES CONCERNING THE DIAGNOSIS OF MENTAL RETARDATION.

Petitioner's challenge to Florida's statutory scheme for determining whether a capital offender is mentally retarded rests on the following syllogism: (1) *Atkins* held that States must precisely adhere to clinical guidelines recommended by leading mental health organizations concerning the diagnosis of mental retardation; (2) Florida's statutory framework does not precisely adhere to such guidelines; and therefore (3) Florida's statute is unconstitutional. See, *e.g.*, Pet. Br. 4 ("Nothing in *Atkins* . . . authorizes the States to . . . defin[e] mental retardation in a way that excludes defendants who qualify for a diagnosis of mental retardation *under accepted clinical standards*.") (emphasis added).

Petitioner's theory fails at the outset because its major premise misunderstands *Atkins*, construing far too narrowly the leeway afforded the States to implement the constitutional restriction on executing mentally retarded offenders. Contrary to Petitioner's assertions, the *Atkins* Court did not hold that "accepted clinical standards" form the constitutional standard for State procedures designed to determine

whether a capital offender "fall[s] within the range of mentally retarded offenders about whom there is a national consensus." 536 U.S. at 317. To the contrary, the Court expressly left to the States "the task of developing appropriate ways to enforce" the broad constitutional restriction announced in *Atkins* against executing mentally retarded offenders. *Id.*

A. *Atkins* Holds That the Eighth Amendment Prohibits the Execution of Mentally Retarded Offenders.

The Eighth Amendment to the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST., amend. VIII.[2] Although the terms "cruel and unusual" defy precise definition, the Court has made clear that their meaning is "not static." *Trop* v. *Dulles*, 356 U.S. 86, 100-101 (1958). At a minimum, the Amendment "prohibits punishment considered cruel and unusual at the time the Bill of Rights was adopted." *Penry* v. *Lynaugh*, 492 U.S. 302, 330 (1989).

In addition, the Court's application of the Amendment recognizes the nation's "evolving standards of decency that mark the progress of a maturing society." *Trop*, 356 U.S. at 101.

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2. The Amendment applies to the States through the Due Process Clause of the Fourteenth Amendment. *Robinson* v. *California*, 370 U.S. 660, 666 (1962).

Accordingly, the Amendment's meaning "is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems* v. *United States*, 217 U.S. 349, 378 (1910); see also *McCleskey* v. *Camp*, 481 U.S. 279, 300 (1987) ("[O]ur constitutional decisions have been informed by contemporary values concerning the infliction of a challenged sanction.") (internal quotation marks and citation omitted).

"Construing and applying the Eighth Amendment in the light of our evolving standards of decency," *Atkins*, 536 U.S. at 321 (internal quotation marks omitted), the Court held in *Atkins* that the Constitution prohibits the execution of mentally retarded offenders. *Id.* Canvassing a number of state statutes enacted since 1990 prohibiting the execution of mentally retarded offenders, including Florida's statute at issue here, the Court concluded that it was "fair to say that a national consensus has developed" against the execution of these offenders. *Id.* at 315-316; see also *infra* Part II. The Court further concluded that its own "independent evaluation" of the question "reveals no reason to disagree with the judgment of the legislatures that have recently addressed the matter and concluded that death is not a suitable punishment for a mentally retarded criminal." *Id.* at 321 (internal quotation marks omitted).

B. The States Have Substantial Leeway in Implementing *Atkins*.

Petitioner views *Atkins* as dictating that States strictly follow "accepted clinical standards" for diagnosing mental retardation when determining which capital offenders may not be executed. See, *e.g.*, Pet. Br. 4 ("Nothing in *Atkins* . . . authorizes the States to . . . defin[e] mental retardation in a way that excludes defendants who qualify for a diagnosis of mental retardation under *accepted clinical standards*.") (emphasis added); *id.* 42 ("[I]n light of the measurement error in all IQ tests, if a person's obtained IQ test score on such a test is 75 or below, *accepted clinical practice* requires examining the person's adaptive functioning before ruling out a diagnosis of mental retardation.") (emphasis added).

Petitioner premises this argument on the fact that, when describing mental retardation in *Atkins*, the Court cited definitions provided by the American Association on Mental Retardation (AAMR), now the American Association on Intellectual and Developmental Disabilities (AAIDD), and the American Psychiatric Association (APA). Pet. Br. 28-29. The Court did cite these definitions in describing mental retardation. *Atkins*, 536 U.S. at 317 n.22; see also *id.* at 308 n.3. But general citation of clinical definitions of mental retardation hardly equates to the adoption, as a constitutional standard, of both those definitions and all related "accepted clinical standards" offered by mental health organizations

for the diagnosis of mental retardation. Nothing in *Atkins* suggests that the Court outsourced to the AAIDD or the APA the constitutional standard for implementing the restriction on executing mentally retarded offenders.

To the contrary, the Court expressly left to the States the "task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Id.* at 317. Notably, the Court understood that the existing statutory definitions of mental retardation enacted by the States were "not identical" and only "generally conform[ed]" to the clinical definitions cited in the Court's opinion. *Id.* n.22. Indeed, at the time *Atkins* was decided, at least two States had rejected strict adherence to the clinical standards promulgated by mental health organizations. The Tennessee Supreme Court had held that the statutory phrase "deficits in adaptive behavior" should be given its ordinary, non-technical meaning. *State* v. *Smith*, 893 S.W.2d 908, 917 (Tenn. 1994). And the Indiana Supreme Court refused to adopt the definition of adaptive functioning set forth in the APA's *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 1994) (DSM-IV). *Rondon* v. *State*, 711 N.E.2d 506, 516 n.14 (Ind. 1999). Nonetheless, the Court nowhere held or even implied that States could comply with the Eighth Amendment only by strictly conforming their statutes to such clinical definitions, much less by strict conformance to

"accepted" clinical standards or practices identified by mental health organizations.

Petitioner's contrary argument suggests that *Atkins* allowed the States only narrow leeway to "develop appropriate *procedures*" to enforce the constitutional restriction, Pet. Br. 31, leaving the *substantive criteria* for determining whether an offender "fall[s] within the range of mentally retarded offenders about whom there is a national consensus," *Atkins*, 536 U.S. at 317, entirely to mental health organizations such as the APA and the AAIDD.

Petitioners are incorrect. As the Court reaffirmed in *Bobby* v. *Bies*, 556 U.S. 825 (2009), its *Atkins* decision "did not provide definitive procedural *or substantive* guides for determining when a person who claims mental retardation 'will be so impaired as to fall [within *Atkins*' compass].'" *Id.* at 831 (quoting *Atkins*, 536 U.S. at 317) (emphasis added). Rather, the Court made clear that the States were tasked with developing both substantive criteria and appropriate procedures for determining whether an offender is mentally retarded and therefore cannot be executed. *Bies*, 556 U.S. at 831.[3]

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3. Likewise, circuit court decisions understand *Atkins* as charging the States with developing substantive criteria for determining mental retardation as well as appropriate procedures for making these determinations. No circuit court has reached a contrary conclusion. See, *e.g.*, *Hill* v. *Humphrey*,

It is unremarkable that the Court charged the States, rather than mental health organizations, with developing substantive criteria to implement *Atkins*. Doing so was consistent with the Court's precedent that it has "traditionally left to legislators the task of defining terms of a medical nature that have legal significance." *Kansas* v. *Hendricks*, 521 U.S. 346, 359 (1997) (concerning when mental illness subjects someone to civil commitment). Indeed, the Court has explicitly recognized that legal and clinical standards are not always the same. See, *e.g.*, *Hendricks*, 521 U.S. at 359 (noting that legal definitions of "insanity" and "competency" "vary

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662 F.3d 1335, 1351–1352 (11th Cir. 2011) (en banc) ("*Atkins* itself does not support Hill's argument. *Atkins* did not bestow a substantive Eighth Amendment right to a fixed and rigid definition of 'mentally retarded persons.' Indeed, various states use different definitions of intellectual functioning (some draw the line at an IQ of 75 or below, some at 70 or below, others at 65 or below) and consider different factors in assessing adaptive functioning."); *Clark* v. *Quarterman*, 457 F.3d 441, 444–445 (5th Cir. 2006) ("To support his argument that the state court erred in choosing his base IQ score as the relevant IQ score rather than the lowest number in the confidence band, Clark argues that the Texas courts *must* apply the approach articulated by the [AAMR], which dictates that IQ examiners account for the appropriate confidence band. . . . The Supreme Court, in [*Atkins*], left to the States the task of developing ways to enforce the constitutional restriction upon their execution of sentences. Although the Court did refer to the clinical definitions of mental retardation promulgated by the AAMR and the [APA], it did not dictate that the approach and the analysis of the State inquiry *must* track the approach of the AAMR or the APA exactly.") (internal citations and formatting omitted).

substantially from their psychiatric counterparts"). "Legal definitions . . . which must 'take into account such issues as individual responsibility . . . and competency' need not mirror those advanced by the medical profession." *Id.* (quoting the DSM-IV).[4]

Further, Petitioner's suggestion that state legislatures are constitutionally required to adopt clinical "best practices" concerning the criteria for determining whether an offender is mentally retarded is reminiscent of a similar argument that was rejected in *Baze* v. *Rees*, 553 U.S. 35 (2008). In *Baze*, the Court reviewed an Eighth Amendment challenge to a State's execution protocol. A plurality of the Court observed that the petitioners' case essentially rested on a contention that they had identified an unacceptable risk of substantial physical pain associated with executions using lethal injection, and that this alleged risk could be eliminated by adopting alternative procedures such as a one-drug protocol or additional monitoring by trained personnel. *Id.* at 51. Rejecting this argument, the plurality explained that "[p]ermitting an Eighth Amendment violation to be established on such a showing would threaten to transform courts

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4. Similarly, the Court has held that the "ever-advancing science" of psychiatry "informs but does not control ultimate legal determinations" and that psychiatry's "distinctions do not seek precisely to mirror those of the law." *Kansas* v. *Crane*, 534 U.S. 407, 413 (2002). The same observations apply to the field of mental disability, as aptly explained in the Brief for Respondent. See Resp. Br. 25-35.

into boards of inquiry charged with determining 'best practices' for executions, with each ruling supplanted by another round of litigation touting a new and improved methodology." *Id.* "Such an approach finds no support in our cases, would embroil the courts in ongoing scientific controversies beyond their expertise, and would substantially intrude on the role of state legislatures in implementing their execution procedures." *Id.* Given the constantly evolving science related to diagnosing mental retardation and the often varying approaches to clinical practice espoused by the leading mental health organizations, see Resp. Br. 25-35, the *amici* States submit that the arguments advanced by Petitioner in this case raise the same concern discussed in *Baze*.

In sum, Florida correctly understood its prerogative under *Atkins* to develop both legal processes and a substantive legal standard—which need not mirror recommended clinical practices—for determining whether an otherwise death-eligible offender is mentally retarded.

II. THERE IS NO "NATIONAL CONSENSUS" CONTRARY TO FLORIDA'S STATUTORY SCHEME FOR DETERMINING WHETHER AN OFFENDER IS MENTALLY RETARDED.

Petitioner also argues that Florida's framework for determining whether an offender is mentally retarded renders it an "outlier" among the States,

implying that there is a national consensus establishing its invalidity. See Pet. Br. 44-46; see also Br. of Former Judges and Law Enforcement Officials 5-8.

No such consensus exists. In fact, a number of other States have adopted approaches to evaluating the intellectual function aspect of mental retardation that are either identical or similar to Florida's system. Further, taken as a whole, the States' frameworks for evaluating intellectual function in this context, and mental retardation more generally, are markedly varied—reflecting a continuum of criteria and often complex procedures.[5]

Because there is no "national consensus" among the States contrary to Florida's challenged statute, the "'clearest and most reliable objective evidence of contemporary values'" fails to support Petitioner's

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5. *Amici* States include as Appendices to this brief two charts comparing features of state statutes and procedures for determining whether a capital offender is mentally retarded. The charts include information on all States that currently provide for capital punishment or that provided for capital punishment at the time *Atkins* was decided. Appendix A compares the various States' definitions of mental retardation and IQ score criteria, if any, applicable to evaluating the intellectual function aspect of mental retardation. Appendix B compares the States' criteria for evaluating the adaptive deficit aspect of mental retardation analysis, as well as the varying burdens of proof that the States have imposed on capital offenders claiming mental retardation. Citations of "App.__" refer to these Appendices.

claim that it is unconstitutional. *Atkins*, 536 U.S. at 312 (quoting *Penry*, 492 U.S. at 331).

A. The Court Has Repeatedly Emphasized the Central Importance of National Consensus in Eighth Amendment Cases.

As the Court reaffirmed in *Atkins*, "'The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'" 536 U.S. at 311-312 (quoting *Trop*, 356 U.S. at 101). In discerning the nation's evolving moral standards, the Court has looked to "objective evidence of how our society views a particular punishment today." *Penry*, 492 U.S. at 331. And the "'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" *Atkins*, 536 U.S. at 312 (quoting *Penry*, 492 U.S. at 331). Thus, it is the values of the people as expressed through their state legislatures—not clinical practices or advocacy organizations—that best define the contemporary boundaries of the Eighth Amendment's ban on "cruel and unusual punishment."

Consistent with this framework for Eighth Amendment analysis, when the *Atkins* Court analyzed whether the Amendment bars the execution of mentally retarded offenders, it examined whether the actions of the various States reflected a national consensus on the issue. 536 U.S. at 313-318. The Court noted that, since 1990, a significant number of

States, including Florida, had enacted legislation barring the execution of mentally retarded criminals—and no States had enacted legislation expressly permitting such executions. *Id.* at 314-316. The Court reasoned that such enactments provided "powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal." *Id.* at 316. The Court continued, "[t]he practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it." *Id.* Seeing no reason to disagree with the consensus judgment of the States, the Court concluded that the execution of mentally retarded offenders is unconstitutional. *Id.* at 321.

Since *Atkins*, when considering Eighth Amendment challenges the Court has continued to examine the actions of the States as the most objective and best evidence of contemporary values. For example, when the Court addressed whether the Amendment bars imposing the death penalty on juvenile offenders under 18, the Court again looked to national consensus to measure the Amendment's moral requirements. *Roper* v. *Simmons*, 543 U.S. 551, 564-569 (2005). Comparing the legislative trends among the States regarding juvenile offenders with those analyzed in *Atkins*, the Court in *Roper* concluded that "[t]he evidence of national consensus against the death penalty for juveniles is similar, and in some respects parallel, to the evidence *Atkins* held sufficient to demonstrate a national consensus

against the death penalty for the mentally retarded." *Id.* at 566. And, noting that "[a] majority of States have rejected the imposition of the death penalty on juvenile offenders under 18," the Court held the practice barred by the Eighth Amendment. *Id.* at 568.

On the other hand, when a national consensus has *not* developed against a criminal sentence, the Court has taken equal care to avoid declaring government conduct unconstitutional. For example, when there was not yet a consensus among the States prohibiting execution of mentally retarded offenders, the Court reasoned that such executions did not offend the Eighth Amendment. *Penry*, 492 U.S. at 334-335 ("[A]t present, there is insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment."). And when the national consensus had not yet developed against execution of persons 16 or 17 years of age, a plurality of the Court likewise concluded that "such punishment does not offend the Eighth Amendment's prohibition against cruel and unusual punishment." *Stanford* v. *Kentucky*, 492 U.S. 361, 380 (1989).

Likewise, when a national consensus has supported a criminal sentence, the Court has been exceedingly reluctant to declare that punishment to be "cruel and unusual" under our contemporary moral standards. In *Tison* v. *Arizona*, 481 U.S. 137,

138 (1987), for example, the Court considered whether States may execute those who substantially participate in a felony involving a murder. As in other cases, the Court expressly acknowledged the importance of "the state legislatures' judgment" when assessing whether a punishment violates contemporary norms. *Id.* at 152. Noting that a consensus of States authorized the death penalty for persons who substantially participated in felonies involving a murder, the Court concluded that the "substantial and recent legislative authorization of the death penalty for the crime of felony murder regardless of the absence of a finding of an intent to kill powerfully suggests that our society does not reject the death penalty as grossly excessive under these circumstances." *Id.* at 154. Accordingly, the Court concluded that death sentences for those who substantially participate in a felony murder can be constitutional. *Id.* at 158.

These cases teach that the Court treads carefully when determining whether a national consensus exists in Eighth Amendment cases. The *amici* States submit that the Court should exercise particular caution in evaluating whether a national consensus exists regarding their current implementation of *Atkins*, a decision issued only 11 years ago. The States' development of appropriate criteria and procedures to determine the mental retardation claims of offenders who have committed murder and been sentenced to death is "in its infancy," and "[f]ew, if any, of the States have had sufficient

experience with these laws to know whether they are sensible in the long term." *Atkins*, 536 U.S. at 344 (Scalia, J., dissenting). At this point there is nothing close to a national consensus on how to ascertain mental retardation in the context of cruel and unusual punishment under the Eighth Amendment. See *infra* Part II.B. And it is fair to presume that the States' statutory schemes for implementing *Atkins* will change, perhaps substantially, as they gain experience with this issue. The Court should intervene in that process only in the narrowest of circumstances.

B. Florida's Framework for Determining Whether an Offender Is Mentally Retarded Is Reasonable and Shares Critical Features with the Approaches of a Number of Other States.

1. Florida's mental retardation criteria reflect the guidance of mental health organizations, while not strictly adhering to all accepted clinical practices.

As Petitioner acknowledges, Pet. Br. 16, before *Atkins* was decided Florida had enacted a statute prohibiting the execution of mentally retarded offenders. FLA. STAT. § 921.137. Section 921.137 describes Florida's governing legal standard for such claims, and Florida Rule of Criminal Procedure 3.203 outlines the procedural requirements. Both the

statute and rule define the elements of a mental retardation claim under *Atkins* as a three-part, conjunctive test. The inmate must show: (1) significantly subaverage general intellectual functioning, (2) concurrently existing deficits in adaptive behavior, and (3) that these conditions must have manifested during the period from conception to age 18. FLA. STAT. § 921.137(1); FLA. R. CRIM. P. 3.203(b). Petitioner concedes that this test is consistent with clinical definitions of mental retardation and with *Atkins*. Pet. Br. 16-17.

Florida's statute also defines the term "significantly subaverage general intellectual functioning" to mean performance that is two or more standard deviations from the mean score on a standardized IQ test. § 921.137(1). A score that is "two deviations from the mean" is clinically understood to mean an IQ score of approximately 70. DSM-IV at 40; see also *Atkins*, 536 U.S. at 308 n.3 ("'Mild' mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70."). Petitioner also concedes that this definition as written is consistent with clinical definitions of mental retardation and with *Atkins*. Pet. Br. 16-17.

Petitioner nevertheless theorizes that the Florida Supreme Court's interpretation of the statute renders it unconstitutional. Toward that end, Petitioner focuses on the Florida Supreme Court's holding that an offender who has not obtained an IQ

test score of 70 or lower cannot meet the "significantly subaverage general intellectual functioning" prong of Section 921.137. *Cherry* v. *State*, 959 So. 2d 702, 712-713 (Fla. 2007); see also *Hall* v. *Florida*, 109 So. 3d 704, 708-710 (Fla. 2012). And because an offender "must establish all three elements of [a mental retardation claim under Section 921.137], the failure to establish any one element will end the inquiry." *Hall*, 109 So. 3d at 710; see also *Cherry*, 959 So. 2d at 714 (same).

Petitioner maintains that Florida's "bright line" cutoff of an IQ score of 70 improperly fails to take into account the "standard error of measurement" (SEM) associated with such tests by leading mental health organizations such as the APA and the AAIDD. Pet. Br. 33-34. Petitioner specifically points to the current APA definition of "significant limitations in intellectual functioning," which provides that an IQ score should account for measurement error within a range of ± 5 points: "'Individuals with intellectual disability have scores of approximately two standard deviations or more below the population mean, including a margin for measurement error (generally ± 5 points).'" *Id.* 35-36 (quoting APA, *Diagnostic and Statistical Manual of Mental Disorders* 37 (5th ed. 2013)). Thus, while Petitioner purports to attack Florida's "bright line" rule, it appears that he just wants to move it up by five points. Regardless, his analysis fails because the Florida Supreme Court's application of its statutory and procedural framework is not only reasonable and

accurate, but consistent with the critical facets of other States' frameworks.

2. Florida's test for assessing the intellectual function aspect of mental retardation is identical or similar to the tests employed by a number of other States.

In Petitioner's view, Florida's failure to require its courts to apply the SEM renders its statute unconstitutional. *Id.* 46-49. Impliedly acknowledging the importance of discerning a national consensus against Florida's practice in determining whether its statute truly violates contemporary values, Petitioner suggests that Florida's failure to adopt the SEM "places it in the minority of jurisdictions." *Id.* 43. Yet Petitioner makes no meaningful attempt to establish that Florida's framework for evaluating the "significantly subaverage general intellectual functioning" aspect of mental retardation is actually an "outlier," or that it falls outside of a "national consensus" adopting this clinical practice. See *id.* 44-46. And with good reason: there is no such national consensus and Florida's statute is not an "outlier" among the States.

To the contrary, Florida is among ten States in which an obtained IQ test score above 70 is a conclusive, bright-line cutoff (without using the SEM) in evaluating the intellectual function prong of mental retardation. See App. A. For example, in

Bowling v. *Commonwealth*, 163 S.W.3d 361 (Ky. 2005), the Kentucky Supreme Court held that its General Assembly "chose a bright-line cutoff ceiling of an IQ of 70" in its mental retardation statute. *Id.* at 375 (interpreting KY. REV. STAT. § 532.130(2)). Alabama has also made clear that an IQ test score of 70 or below is required to prove mental retardation, *Morris* v. *State*, 60 So. 3d 326, 340 (Ala. Crim. App. 2010), and that courts are not required to use the SEM, *Smith* v. *State*, 112 So. 3d 1108, 1132 (Ala. Crim. App. 2012). And Arizona provides for a screening process under which a court-appointed psychological expert first assesses whether the offender's intelligence quotient is 75 or less, and if so the offender is evaluated further, including the administration of several additional IQ tests. See ARIZ. REV. STAT. § 13-753(A)-(E). If the offender's IQ scores on the additional tests are above seventy, the State's notice of intent to seek the death penalty will not be dismissed on the ground of intellectual disability. *Id.* § 13-753(F).[6]

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6. Arizona's statute provides that the intelligence quotient determination "shall take into account the margin of error for the test administered," ARIZ. REV. STAT. § 13-753(K)(5), "unless the context otherwise requires," *id.* § 13-753(K). Thus, when determining whether a defendant has mental retardation pursuant to a hearing under Section 13-753(G), the margin of error shall be taken into account. In contrast, Section 13-753(F) contemplates a threshold determination using a cutoff based on specific test scores of seventy. This cutoff, which must be satisfied to allow a defendant to advance to a hearing on a mental retardation claim, "accounts for margin of error by

Further, similar to the decisions of the Florida Supreme Court, in *Pizzuto* v. *State*, 202 P.3d 642 (Idaho 2008), the Supreme Court of Idaho held that "the [Idaho] legislature did not require that the IQ score be within five points of 70 or below. It required that it be 70 or below." *Id.* at 651 (interpreting IDAHO CODE § 19-2515A).[7] Likewise, the Supreme Court of Virginia has held that IQ scores of 75 and 78 "exceed the score of 70 that the General Assembly has chosen as the threshold score below which one may be classified as being mentally retarded" in Virginia. *Johnson* v. *Commonwealth*, 591 S.E.2d 47, 59 (Va. 2004), *vacated and remanded on other grounds*, 544 U.S. 901 (2005) (interpreting VA. CODE § 19.2-264.3:1.1); see also *Gray* v. *Warden of Sussex I*

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requiring multiple tests." *State* v. *Roque*, 141 P.2d 368, 403 (Ariz. 2006) (en banc).

7. The court rejected the offender's argument that the district court "should infer that [his] actual IQ was lower than his test score," explaining that the district court "could just as reasonably have inferred that it was higher." *Pizzuto*, 202 P.3d at 651. But see *Pizzuto* v. *Blades*, 729 F.3d 1211, 1217 n.2 (9th Cir. 2013) ("We do not read the Idaho Supreme Court's decision as holding that a defendant must present an IQ test score, as opposed to an actual IQ, of 70 or below."). The Ninth Circuit's distinction between the statutory cutoff and the IQ test scores cannot be reconciled with the Idaho opinion. Rather, the Idaho Supreme Court rejected Pizzuto's argument that the SEM should be used to adjust his "IQ score" obtained on the Wechsler test, reasoning that the legislature "required that [the IQ score] be 70 or below" when enacting Idaho's statute. *Pizzuto*, 202 P.3d at 651.

State Prison, 707 S.E.2d 275, 306 (Va. 2011) (citing its prior decision in *Johnson* designating 70 as a cutoff IQ score and noting that an offender's "performance I.Q. score in 2006 was two points above the legal threshold under which one could be classified as being mentally retarded in Virginia").[8]

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8. North Carolina's statute has likewise been applied to establish 70 as a bright line cutoff. See *Larry* v. *Branker*, 552 F.3d 356, 369 (4th Cir. 2009) (applying North Carolina's statute, N.C. GEN. STAT. § 15A-2005, court noted that, "Requiring Larry to establish an IQ of 70 or less is neither contrary to, nor an unreasonable application of, *Atkins*); *Richardson* v. *Branker*, 668 F.3d 128, 152 (4th Cir. 2012) (under federal habeas corpus review, cut-off of 70 applied; legislature did not provide any adjustment theories). In addition, the statutes of Delaware and Washington establish a bright line cutoff of test scores of 70. *Compare* DEL. CODE tit. 11, § 4209(d)(3) ("'Significantly subaverage intellectual functioning' means an intelligence quotient of 70 or below obtained by assessment with 1 or more of the standardized, individually administered general intelligence tests developed for the purpose of assessing intellectual functioning."); WASH. REV. CODE § 10.95.030.2 ("'General intellectual functioning' means the results obtained by assessment with one or more of the individually administered general intelligence tests developed for the purpose of assessing intellectual functioning. . . . 'Significantly subaverage general intellectual functioning' means intelligence quotient seventy or below."), *with* TENN. CODE § 39-13-203 (referencing IQ of 70 but not tests, and interpreted to allow expert witnesses to opine as to a defendant's "functional intelligence quotient" using the standard error of measurement and other factors by *Coleman* v. *State*, 341 S.W.3d 221, 242 & n.55 (Tenn. 2011)). Maryland has since abolished the death penalty, but its mental retardation statute also imposed a firm cutoff at an IQ score of 70. MD.

Two States have adopted bright line cutoffs applicable to IQ test scores above 75. See OKLA. STAT. tit. 21, § 701.10b(c) ("in no event shall a defendant who has received an intelligence quotient of seventy-six (76) or above on any individually administered, scientifically recognized, standardized intelligence quotient test administered by a licensed psychiatrist or psychologist, be considered mentally retarded . . ."); [9] *Chase* v. *State*, 873 So. 2d 1013 (Miss. 2004) (en banc) (holding that "cutoff score" for mental retardation is 75). And several States have implemented statutory schemes that impose rebuttable presumptions concerning mental retardation that are premised on IQ test scores. See *State* v. *Lott*, 779 N.E.2d 1011, 1015 (Ohio 2002) (per curiam) (IQ score above 70 results in rebuttable presumption that individual is not mentally retarded); S.D. CODIFIED LAWS § 23A-27A-26.1 (same); NEB. REV. STAT. § 28-105.01 (IQ score of 70 or below is presumptive evidence of mental retardation); ARK. CODE § 5-4-618 (IQ score of 65 or below is presumptive evidence of mental retardation).

CODE, CRIM. LAW § 2-202 ("the defendant had significantly below average intellectual functioning, as shown by an intelligence quotient of 70 or below on an individually administered intelligence quotient test").

9. Hall's mental retardation claim would necessarily fail in Oklahoma because its statute bars a defendant from being considered mentally retarded if he has scored a 76 or above on *any* IQ test. *Smith* v. *State*, 245 P.3d 1233, 1237 (Okla. Crim. App. 2010).

On the other hand, a number of States have instituted frameworks for assessing mental retardation that either do not require a specific IQ score or that contemplate application of the SEM in evaluating such scores. See *In re Hawthorne*, 105 P.3d 552, 557 (Cal. 2005) (noting that "unlike some states, the California Legislature has chosen not to include a numerical IQ score as part of the definition of mentally retarded"); *Stripling* v. *State*, 401 S.W.2d 500, 504 (Ga. 1991) (recognizing that IQ numbers are inconclusive and accurate only within a range of several points); *State* v. *Dunn*, 41 So. 3d 454, 470 (La. 2010) (noting that IQ tests are inconclusive and applying the SEM); *Ybarra* v. *State*, 247 P.3d 269, 274 (Nev. 2011) (en banc) (citing the DSM for SEM effect and stating that objective IQ testing not required for a finding of mental retardation).[10]

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10. See also *State* v. *Maestas*, 299 P.3d 892, 948 (Utah 2012) (SEM should be considered in evaluating IQ test scores); *Coleman* v. *State*, 341 S.W.3d 221, 242 & n.55 (Tenn. 2011) (allowing expert witnesses to opine as to a defendant's "functional intelligence quotient" using the standard error of measurement and other factors); *Ex Parte Hearn*, 310 S.W.3d 424, 428 (Tex. Crim. App. 2010) (recognizing the SEM). But see *Ex parte Briseno*, 135 S.W.3d 1, 14 n.53 (Tex. Crim. App. 2004) ("This statistical 95% confidence interval may not be an entirely appropriate measurement when the burden of proof is preponderance of the evidence, not a 95% confidence burden. There is not, however, enough information in this record to decide that question.").

Finally, it is unclear how a number of States approach the evaluation of the intellectual function prong of the mental retardation analysis. For example, in Montana this issue is not addressed by statute or case law. And the limited guidance available for Colorado, Connecticut, Kansas, New Hampshire, New York, Oregon, Wyoming, and South Carolina leaves the issue unsettled in these States.[11] See App. A.[12]

In sum, the fact that Florida adheres to a firm IQ-score cutoff in determining whether an offender has demonstrated "significant limitations in intellectual functioning" does not render it an "outlier" among the States. And to the extent it can be said that any "national consensus" exists amongst the States in exercising their authority under *Atkins*, there is no such consensus contrary to Florida's approach.

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11. New York and Connecticut have abolished the death penalty, but were at one time subject to *Atkins*. See App. A. And because Connecticut's repeal was not retroactive, it still has 11 offenders eligible for execution. See The Death Penalty Information Center, http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last visited Jan. 31, 2014).

12. As noted in Appendix A, Kansas has made clear that it requires a capital offender to specifically demonstrate an impairment in his capacity to appreciate the criminality of his conduct. KAN. STAT. §§ 21-6622, 76-12b01.

3. The States do not adhere to clinical definitions and practices regarding mental retardation, nor have they formed a consensus on appropriate assessment criteria and procedures.

The lack of any "national consensus" against Florida's mental retardation statute reflects a broader reality concerning the States' implementation of *Atkins* in the 11 years since it was decided. Understanding that the mental retardation inquiry is complex and the stakes are high, state legislatures have plainly wrestled with how best to effectuate *Atkins* through substantive criteria and procedures that reflect the values and concerns of their constituents, and that vindicate their sovereign interest in administering their criminal justice systems.

In so doing, the States have predictably and appropriately taken varied approaches in assessing mental retardation claims made by offenders who have committed murder and been sentenced to death. Viewed as a whole, those approaches do not strictly adhere to clinical definitions or practices recommended by mental health organizations, nor do they form a consensus on appropriate criteria and procedures for defining mental retardation or assessing intellectual function and alleged adaptive deficits. See App. A-B. The APA itself has cited a scholarly article in its *amicus* brief that addressed this very issue, observing that "fewer than half" of

the legislative definitions of mental retardation promulgated in death-penalty States "define mental retardation using accepted clinical standards." David DeMatteo, et al., *A National Survey of State Legislation Defining Mental Retardation: Implications for Policy and Practice After Atkins*, 25 Behav. Sci. & L. 789 (2007) (cited in Br. of *Amici Curiae* American Psychological Association, et al.). The same article emphasized the "*widely varying definitions of mental retardation*" adopted by the States and observed that "the large majority of states [have] either failed to mention all three elements common to clinical definitions of mental retardation, or failed to operationally define some or all of the elements in a meaningful manner." *Id.* (emphasis added).

As the article cited to the Court by the APA suggests, just as the States have adopted approaches to defining mental retardation and evaluating the intellectual function aspect of mental retardation that differ from clinical guidelines and from each other, the same is true with regard to adaptive deficit analysis. See App. B. For example, contrary to clinical practices identified by mental health organizations, Utah limits the deficits in adaptive functioning to "primarily . . . the areas of reasoning or impulse control, or in both of these areas." *Maestas*, 299 P.3d at 945 (quoting UTAH CODE § 77-15a-102). Mississippi's test includes an additional prong that requires an offender to prove that he is not malingering. *Thorson* v. *State*, 76 So. 3d 667, 670

(Miss. 2011) (en banc).[13] And the Arizona Supreme Court has held that the DSM-IV definition of mental retardation "is not the same as the statutory definition." *State* v. *Grell*, 135 P.3d 696, 709 (Ariz. 2006) (en banc).[14]

The States have also established varying burdens of proof regarding mental retardation. See App. B. Although all States place the burden on the offender to prove he is mentally retarded, there is no consensus on the standard of proof. See App. B. A number of States require the offender to meet a "clear and convincing" evidence standard,[15] while

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13. Mississippi's Supreme Court has also stated that "there is considerable, sincere disagreement among professionals and legal scholars in the field as to the best method for measuring adaptive functioning. The concept of adaptive functioning is an unsettled area without consensus among experts." *Doss* v. *State*, 19 So. 3d 690, 714 (Miss. 2009) (en banc).

14. A number of States' adaptive functioning criteria appear to be premised on characteristics identified by the Court in *Atkins*, rather than tests promulgated by the AAIDD or the APA. The Louisiana Supreme Court, for example, recognized the "factors" used by the Court in *Atkins*. *State* v. *Williams*, 22 So. 3d 867, 881 (La. 2009) (quoting *Atkins*' reference to "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others").

15. See, *e.g.*, N.C. GEN. STAT. § 15A-2005 (North Carolina); FLA. STAT. § 921.137 (Florida); COLO. REV. STAT. § 18-1.3-1101(2) (Colorado).

others impose a "preponderance of the evidence" standard.[16] And at least one State requires the offender to establish that he is mentally retarded "beyond a reasonable doubt." GA. CODE § 17-7-131(c)(3) and (j).[17]

* * *

The differences among the States' approaches to determining offenders' mental retardation claims reflect that the States are exercising their prerogative as *Atkins* expressly contemplated. They do not imply a split of authority, much less a constitutional violation. Likewise, the Eighth Amendment provides no basis for Petitioner's position: nothing in *Atkins* or any other decision of the Court holds that Florida and the other States are constitutionally required to precisely follow the evolving and often conflicting clinical standards announced by the APA, the AAIDD, and other mental health organizations. In addition to being self-evidently unworkable, such a result defies the Court's established jurisprudence recognizing that "[b]eyond question, the authority of the States over the administration of their criminal justice systems

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16. See, *e.g.*, *Morris* v. *State*, 60 So. 3d 326, 340 (Ala. Crim. App. 2010) (Alabama); ARK. CODE § 5-4-618 (Arkansas); *Chase* v. *State*, 873 So. 2d 1013, 1029 (Miss. 2004) (en banc) (Mississippi); MD. CODE, CRIM. LAW § 2-202 (Maryland).

17. As with the other criteria and procedures concerning the assessment of mental retardation claims, the applicable burden of proof remains unclear in several States. See App. B.

lies at the core of their sovereign status." *Oregon* v. *Ice*, 555 U.S. 160, 170 (2009) (citing and quoting *Patterson* v. *New York*, 432 U.S. 197, 201 (1977) ("It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government.")).

Taken to its logical conclusion, Petitioner's argument also contravenes the "long-recognized role of the States as laboratories for devising solutions to difficult legal problems." *Ice*, 555 U.S. at 171 (citing *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). In *Atkins*, the Court made clear that it intended the States to devise the solutions for appropriately implementing the constitutional restriction on executing mentally retarded offenders. Outsourcing that authority to mental health organizations does not further, but rather frustrates, the intent of *Atkins*.

CONCLUSION

The Court should affirm the decision of the Florida Supreme Court.

Respectfully submitted.

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APPENDIX

APPENDIX A

Mental Retardation (MR) Definitions and IQ Requirements		
State	**MR Definition**	**IQ Requirements**
AL	Three general criteria.[1] Ala. Code. § 15-24-2.	70 or below qualifies as MR. *Morris* v. *State*, 60 So. 3d 326, 340 (Ala. Crim. App. 2010). *Smith* v. *State*, 71 So. 3d 12, 20 (Ala. Crim. App. 2008) (declining to apply SEM).
AZ	Three general criteria. Ariz. Rev. Stat. § 13-753(K)(3).[2]	Scores above 70 disqualify defendant from MR status.[3] *State* v. *Roque*, 141 P.3d 368, 403 (Ariz. 2006) (threshold pre-hearing determination accounts for SEM through multiple tests).

1. The three "general criteria" for mental retardation (or intellectual disability (ID)) as outlined in the AAIDD and DSM-IV-TR definitions, as well as by *Atkins* are: (1) significantly subaverage general intellectual functioning, (2) significant impairment in adaptive behavior, and (3) manifestation of MR during the appropriate developmental period. In most states that specify, MR symptoms must manifest by age 18.

2. Unless otherwise noted, required IQ level is defined by the mental retardation statute identified for each State.

3. If a defendant has a score 70 or below, a hearing is held at which the trial court will determine whether he has mental

Mental Retardation (MR) Definitions and IQ Requirements		
State	**MR Definition**	**IQ Requirements**
AR	Three general criteria. Ark. Code § 5-4-618.	65 or below results in rebuttable presumption of MR. *Rankin* v. *State*, 948 S.W.2d 397, 404 (Ark. 1997) (refusing to "reduce" scores by the 3-point margin of error). *Jones* v. *State*, 10 S.W.3d 449, 456-57 (Ark. 2000) (upholding cut-off of 65).
CA	Three general criteria. Cal. Penal Code § 1376(a).	No statutory IQ requirement. *In re Hawthorne*, 105 P.3d 552, 557-58 (Cal. 2005) (no IQ cut-off; application of SEM recognized).
CO	Three general criteria. Colo. Rev. Stat. §§ 18-1.3-1101(2); 1103.	No statutory IQ requirement.

retardation. In this determination, the trial court takes the standard error of measurement into account. Ariz. Rev. Stat. § 13-753(K)(5).

Mental Retardation (MR) Definitions and IQ Requirements		
State	**MR Definition**	**IQ Requirements**
CT[4]	Three general criteria. Conn. Gen. Stat. §§ 1-1g; 53a-46a.	Two or more standard deviations below the mean.
DE	Three general criteria. Del. Code tit. 11, § 4209(d)(3).	70 or below qualifies as MR.
FL	Three general criteria. Fla. Stat. § 921.137.	Two or more standard deviations below the mean. *Hall* v. *State*, 109 So. 3d 704, 709-10 (Fla. 2012) (IQ of 70 or below required; SEM not applied).
GA	Three general criteria. Ga. Code § 17-7-131(a)(3).	No statutory IQ requirement. *Stripling* v. *State*, 401 S.W.2d 500, 504 (Ga. 1991) (no IQ cut-off).
ID	Three general criteria. Idaho Code § 19-2515A.	70 or below qualifies as MR. *Pizzuto* v. *State*, 202 P.3d 642, 651 (Idaho 2008) (rejecting SEM).

4. Abolished the death penalty in 2012.

Mental Retardation (MR) Definitions and IQ Requirements		
State	**MR Definition**	**IQ Requirements**
IL[5]	Three general criteria. 725 Ill. Comp. Stat. 5/114-15.	IQ of 75 or below creates a rebuttable presumption of MR.
IN	Three general criteria PLUS age of onset before 22. Ind. Code § 35-36-9-2.	No statutory IQ requirement. *Woods* v. *State*, 863 N.E.2d 301, 304 (Ind. 2007) (recognizing MR in 70 to 75 range).
KS	Three general criteria PLUS impairment in capacity to appreciate the criminality of conduct. Kan. Stat. §§ 21-6622, 76-12b01.	Two or more standard deviations below the mean qualifies as MR. *State* v. *Buckus*, 287 P.3d 894, 905 (Kan. 2012) (in a non-death penalty case, interpreting 76-12b-01 without consideration of SEM).

5. Abolished the death penalty in 2011.

Mental Retardation (MR) Definitions and IQ Requirements		
State	**MR Definition**	**IQ Requirements**
KY	Three general criteria. Ky. Rev. Stat. § 532.130(2).	70 or below qualifies as MR. *Bowling* v. *Commonwealth*, 163 S.W.3d 361, 375 (Ky. 2005) (the General Assembly "chose a bright-line cut-off ceiling of an IQ of 70").
LA	Three general criteria. La. Code Crim. Proc. art. 905.5.1.	No statutory IQ requirement. *State* v. *Dunn*, 41 So. 3d 454, 470 (La. 2010) (applying SEM).
MD[6]	Three general criteria PLUS age of onset before 22. Md. Code, Crim. Law § 2-202.	70 or below qualifies as MR. *State* v. *Thomas*, 599 A.2d 1171, 1180-81 (Md. 1992) (defendant did not qualify as MR because his IQ was 73 and statute required IQ of 70 or below).[7]

6. Abolished the death penalty in 2013.

7. *Thomas* construed an earlier, substantively identical, statute.

Mental Retardation (MR) Definitions and IQ Requirements		
State	**MR Definition**	**IQ Requirements**
MS	Three general criteria. Miss. Code § 41-21-61.[8]	No statutory IQ requirement. *Chase* v. *State*, 873 So. 2d 1013, 1029 n.20 (Miss. 2004) (en banc) ("cutoff score" is 75).
MO	Three general criteria. Mo. Rev. Stat. § 565.030.	No statutory IQ requirement. *Goodwin* v. *State*, 191 S.W.3d 20, 30-31 (Mo. 2006) (en banc) (acknowledging SEM results in possible MR diagnosis with IQ of 70-75).
MT	Unaddressed	Unaddressed

8. General mental retardation definition.

Mental Retardation (MR) Definitions and IQ Requirements		
State	**MR Definition**	**IQ Requirements**
NE	Two general criteria. Neb. Rev. Stat. § 28-105.01 (no age-of-onset requirement).	70 or below presumptive evidence of MR. Application of SEM unclear. *State* v. *Vela*, 777 N.W.2d 266, 304-05 (Neb. 2010) (not passing on trial court's decision to consider SEM because no evidence of adaptive deficiencies).
NV	Three general criteria. Nev. Rev. Stat. § 174.098.7.	No statutory IQ requirement. *Ybarra* v. *State*, 247 P.3d 269, 274 (Nev. 2011) (en banc) (no IQ cut-off).

Mental Retardation (MR) Definitions and IQ Requirements		
State	**MR Definition**	**IQ Requirements**
NH	Three general criteria. N.H. Rev. Stat. § 171-A:2.[9] N.H. Rev. Stat. § 630:5 (death penalty statute listing capacity to understand wrongfulness and mental distress as mitigating factors).	No statutory IQ requirement.
NJ[10]	Three general criteria. *State* v. *Jimenez*, 908 A.2d 181, 184–89 (N.J. 2006).	70 or below qualifies as MR. *Jimenez*, 908 A.2d at 184 n.3 (recognizing SEM, but suggesting a defendant could not establish MR with an IQ of 76 or above).
NM[11]	Two general criteria (no age-of-onset requirement) N.M. Stat. § 31-20A-2.1.	70 or below establishes presumptive evidence of MR.

9. General mental retardation definition.

10. Abolished the death penalty in 2007.

11. Abolished the death penalty in 2009.

Mental Retardation (MR) Definitions and IQ Requirements		
State	**MR Definition**	**IQ Requirements**
NY[12]	Three general criteria. N.Y. Crim. Proc. Law § 400.27.	No statutory IQ requirement.
NC	Three general criteria. N.C. Gen. Stat. § 15A-2005.	70 or below qualifies as MR. *Richardson* v. *Branker*, 668 F.3d 128, 152 (4th Cir. 2012) (under AEDPA review, cut-off of 70 applied; legislature did not provide any adjustment theories).

12. Abolished the death penalty in 2007.

Mental Retardation (MR) Definitions and IQ Requirements		
State	**MR Definition**	**IQ Requirements**
OH	Three general criteria. Ohio. Rev. Code § 5123.01(N).[13]	*State* v. *Lott*, 779 N.E.2d 1011, 1015 (Ohio 2002) (per curiam) (above 70 results in rebuttable presumption of not MR). Application of SEM unclear. *Compare State* v. *O'Neal*, 2006 WL 3457703, at *4 (Ohio Ct. App.—1st Dist. Dec. 1 2006), *with State* v. *Waddy*, 2011 WL 2536366, at *7–8 (Ohio Ct. App.—10th Dist. June 28, 2011).

13. General mental retardation definition.

Mental Retardation (MR) Definitions and IQ Requirements		
State	**MR Definition**	**IQ Requirements**
OK	Three general criteria. Okla. Stat. tit. 21, § 701.10b.	70 or below qualifies as MR; however, a score of 76 or above shall not be considered MR. *Smith* v. *State*, 245 P.3d 1233, 1237 (Okla. Crim. App. 2010) (emphasizing that *any* score above 76 bars a claim of MR).
OR	Three general criteria PLUS impairment in adaptive behavior must be directly related to the intellectual disability. Or. Rev. Stat. § 427.005.[14]	Under 70 qualifies as MR. Person with IQ of 70 through 75 may qualify as MR "if there is also significant impairment in adaptive behavior, as diagnosed and measured by a qualified professional."

14. General mental retardation definition.

Mental Retardation (MR) Definitions and IQ Requirements		
State	**MR Definition**	**IQ Requirements**
PA	Three general criteria. 50 Pa. Cons. Stat. § 4102.[15]	No statutory IQ requirement. *Commonwealth* v. *Miller*, 888 A.2d 624, 630-31 (Pa. 2005) ("Approximately two standard deviations below the mean" qualifies as MR; no IQ cut-off; SEM should be taken into account).
SC	Three general criteria. S.C. Code § 16-3-20.	No statutory IQ requirement.
SD	Three general criteria. S.D. Codified Laws § 23A-27A-26.2.	IQ of above 70 results in presumptive evidence defendant is not MR.

15. General mental retardation definition.

Mental Retardation (MR) Definitions and IQ Requirements		
State	**MR Definition**	**IQ Requirements**
TN	Three general criteria. Tenn. Code § 39-13-203(a).	70 or below qualifies as MR. *Coleman* v. *State*, 341 S.W.3d 221, 242 & n.55 (Tenn. 2011) (allowing expert witnesses to opine as to a defendant's "functional intelligence quotient" using the standard error of measurement and other factors).
TX	Three general criteria. Tex. Health & Safety Code § 591.003(13)[16]; *Ex Parte Hearn*, 310 S.W.3d 424, 428 (Tex. Crim. App. 2010) (adopting section 591.003 along with AAMR definition).	"Two or more standard deviations below the age-group mean for the tests used" qualifies as MR. *Ex parte Hearn*, 310 S.W.3d at 430 (holding that 70 represents a "rough ceiling", but recognizing SEM).

16. General mental retardation definition.

Mental Retardation (MR) Definitions and IQ Requirements		
State	**MR Definition**	**IQ Requirements**
UT	Three general criteria. Utah Code § 77-15a-102.	No statutory IQ requirement. No IQ cut-off. *State* v. *Maestas*, 299 P.3d 892, 948 (Utah 2012).
VA	Three general criteria. Va. Code § 19.2-264.3.	"[A]t least two standard deviations below the mean" qualifies as MR. *Johnson* v. *Commonwealth*, 591 S.E.2d 47, 59 (Va. 2004) (IQ scores of 75 and 78 exceed score of 70, "the threshold score below which one may be classified as MR"), *vacated on other grounds*, 544 U.S. 901 (2005).
WA	Three general criteria. Wash. Rev. Code § 10.95.030.	70 or below qualifies as MR.
WY	Three general criteria. Wy. Stat. § 8-1-102(a)(xiii).[17]	No statutory IQ requirement.

17. General mental retardation definition.

APPENDIX B

Burden of Proof and Adaptive Behavior Requirements		
State	Burden of Proof	Adaptive Behavior Requirements
AL	Preponderance[18] *Morris* v. *State*, 60 So. 3d 326, 340 (Ala. Crim. App. 2010).	Significant limitations in adaptive skills, such as communication, self-care, and self-direction.
AZ	Clear and convincing at pre-trial stage. Preponderance at penalty phase. *State* v. *Grell*, 291 P.3d 350, 352 (Ariz. 2013) (en banc) (independent review using section 13-753 as guide).	No statutory criteria.
AR	Preponderance	No statutory criteria.
CA	Preponderance	No statutory criteria.
CO	Clear and convincing	No statutory criteria.

18. Unless otherwise noted, burden of proof level is defined by the mental retardation statute identified for each State in Appendix A. Additionally, all States that allocate the burden place it on the defendant.

Burden of Proof and Adaptive Behavior Requirements		
State	Burden of Proof	Adaptive Behavior Requirements
CT	Unclear	The effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected for the individual's age and cultural group.

Burden of Proof and Adaptive Behavior Requirements		
State	Burden of Proof	Adaptive Behavior Requirements
DE	Clear and convincing	The effectiveness or degree to which the individual meets the standards of personal independence expected of the individual's age group, sociocultural background and community setting, as evidenced by significant limitations in not less than 2 of the following adaptive skill areas: communication, self-care, home living, social skills, use of community resources, self-direction, functional academic skills, work, leisure, health or safety.

Burden of Proof and Adaptive Behavior Requirements		
State	Burden of Proof	Adaptive Behavior Requirements
FL	Clear and convincing *Snelgrove* v. *State*, 107 So. 3d 242 (Fla. 2012) (per curiam).	The effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community.
GA	Beyond reasonable doubt *Stripling* v. *State*, 711 S.E.2d 665, 669 (Ga. 2011).	No statutory criteria.

Burden of Proof and Adaptive Behavior Requirements		
State	Burden of Proof	Adaptive Behavior Requirements
ID	Preponderance *Pizzuto* v. *State*, 202 P.3d 642, 650 (Idaho 2008).	Significant limitations in adaptive functioning in at least two (2) of the following skill areas: communication, self-care, home living, social or interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety.
IL	Preponderance	Significant deficits in adaptive behavior in at least 2 of the following skill areas: communication, self-care, social or interpersonal skills, home living, self-direction, academics, health and safety, use of community resources, and work.

Burden of Proof and Adaptive Behavior Requirements		
State	Burden of Proof	Adaptive Behavior Requirements
IN	Preponderance *Pruitt* v. *State*, 834 N.E.2d 90, 103 (Ind. 2005).	Substantial impairment of adaptive behavior; that is documented in a court ordered evaluative report.
KS	Unclear	The effectiveness or degree to which an individual meets the standards of personal independence and social responsibility expected of that person's age, cultural group and community.
KY	Preponderance *Bowling* v. *Commonwealth*, 163 S.W.3d 361, 382 (Ky. 2005).	No statutory criteria.
LA	Preponderance	Adaptive behavior as expressed in conceptual, social, and practical adaptive skills.

Burden of Proof and Adaptive Behavior Requirements		
State	Burden of Proof	Adaptive Behavior Requirements
MD	Preponderance	No statutory criteria.
MS	Preponderance *Chase* v. *State*, 873 So. 2d 1013, 1029 (Miss. 2004) (en banc).	Limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work.
MO	Preponderance *State* v. *Johnson*, 244 S.W.3d 144, 150 (Mo. 2008) (en banc).	Limitations in two or more adaptive behaviors such as communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work.
MT	Unaddressed	Unaddressed
NE	Preponderance	No statutory criteria.
NV	Preponderance	No statutory criteria.
NH	Preponderance	No statutory criteria.

Burden of Proof and Adaptive Behavior Requirements		
State	Burden of Proof	Adaptive Behavior Requirements
NJ	Preponderance *Jimenez* v. *State*, 908 A.2d 181, 191–92 (N.J. 2006).	Significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety. *Jimenez*, 908 A.2d at 184 n.3
NM	Unclear	No statutory criteria.
NY	Preponderance	No statutory criteria.

Burden of Proof and Adaptive Behavior Requirements		
State	Burden of Proof	Adaptive Behavior Requirements
NC	Clear and convincing	Limitations in two or more of the following adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure skills, and work skills.
OH	Unclear	No statutory criteria.
OK	Clear and convincing pre-trial, preponderance as special issue to jury.	Significant limitations in two or more of the following adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health, safety, functional academics, leisure skills and work skills.

Burden of Proof and Adaptive Behavior Requirements		
State	Burden of Proof	Adaptive Behavior Requirements
OR	Unclear	Effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected for age and cultural group.
PA	Preponderance *Commonwealth* v. *Sanchez*, 36 A.3d 24, 65 (Pa. Commw. Ct. 2011).	"The collection of conceptual, social, and practical skills that have been learned by people in order to function in their everyday lives, and limitations on adaptive behavior are reflected by difficulties adjusting to ordinary demands made in daily life." *Commonwealth* v. *Miller*, 888 A.2d 624, 630 (Pa. 2005).

Burden of Proof and Adaptive Behavior Requirements		
State	Burden of Proof	Adaptive Behavior Requirements
SC	Preponderance *Franklin* v. *Maynard*, 588 S.E.2d 604, 606 (S.C. 2003) (per curiam)	No statutory criteria.
SD	Unclear	No statutory criteria.
TN	Preponderance	No statutory criteria.
TX	Preponderance *Ex Parte Briseno*, 135 S.W.3d 1, 12 (Tex. Crim. App. 2004).	The effectiveness with or degree to which a person meets the standards of personal independence and social responsibility expected of the person's age and cultural group.
UT	Preponderance Utah Code Ann. § 77-15a-104.12(a)	Significant deficiencies in adaptive functioning that exist primarily in the areas of reasoning or impulse control, or in both of these areas.

Burden of Proof and Adaptive Behavior Requirements		
State	Burden of Proof	Adaptive Behavior Requirements
VA	Preponderance	Significant limitations in adaptive behavior as expressed in conceptual, social and practical adaptive skills.
WA	Preponderance	The effectiveness or degree with which individuals meet the standards of personal independence and social responsibility expected for his or her age.
WY	Unclear	No general statutory criteria. Defined in State training school provision as collection of conceptual, social and practical skills that have been learned by people in order to function in their everyday lives. Wy. Stat. § 25-5-102(b)(iii).

AMICUS CURIAE BRIEF

No. 12-10882

IN THE

Supreme Court of the United States

FREDDIE LEE HALL,

Petitioner,

vs.

FLORIDA,

Respondent.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Eighth Amendment requires Florida to use a clinical definition of mental retardation, including incorporation of "standard error of measurement" for intelligence tests, in its framework for identifying which offenders are exempt from the death penalty under *Atkins* v. *Virginia*.

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IN THE

Supreme Court of the United States

FREDDIE LEE HALL,

Petitioner,

vs.

FLORIDA,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

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1. The parties have consented to the filing of this brief.

   No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

The defendant in this case asks this Court to transform into a constitutional mandate the details of determining whether a given defendant at the borderline of retardation falls slightly on one side or the other of the line. Such micromanagement of state sentencing practice is a grave threat to the finality of judgments. Making such rules by the slow and uncertain mechanism of case law would require repeated relitigation of cases as new rules trickle out, thereby threatening the rights of murder victims' families to see justice carried out within a reasonable time. Such a result would be contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Freddie Lee Hall has committed acts of great violence on four separate occasions. The trial judge in the present case described the offense for which he is sentenced to death.

> "On February 21, 1978, Freddie Lee Hall kidnapped Karol Lea Hurst from the parking lot of a grocery store as she was carrying her packages to her car. He drove her, in her own car, some 18 miles away into another county and into the woods a quarter of a mile off the paved road. There, in the front seat of her car, he forced her to remove her clothes and then he raped her. He listened to her cry, and he listened to her beg for her life and the life of her unborn child. He watched her write a check for him to cash in return for her life. Then he beat her—so hard that it tore the flesh of her neck and shoulders through the fabric of her denim jacket. And then he killed her by firing a bullet into the back of her head, either pulling the trigger himself or encouraging another to do it in his place. There is no evidence that has been presented to this

> Court that reasonably mitigates the aggravated nature of this act. The aggravating circumstances of this case clearly 'outweigh' the mitigating factors." J. A. 60-61.

Ten years before this crime, Hall committed assault with intent to commit rape. J. A. 31. In the months following this crime, he murdered one peace officer in the performance of his duty and shot at another. J. A. 31.

Hall's original death sentence was affirmed on appeal, but it was later overturned because of "a significant change in the law" occurring long after his trial, see *Hall* v. *State*, 541 So. 2d 1125, 1126 (Fla. 1989), namely this Court's decision in *Hitchcock* v. *Dugger*, 481 U. S. 393 (1987).

Hall was resentenced to death in 1991, after the trial judge considered his mitigating evidence, including his mental capacity evidence, J. A. 39-45, and found it was clearly outweighed by the aggravating factors in the passage quoted above.

After many more years of litigation, in 2009 the circuit court held a hearing on Hall's claim to be mentally retarded and therefore exempt from the death penalty under the Eighth Amendment and Florida law. The properly documented IQ tests given to Hall all had scores above 70. The scores were 71, 76, 79, 80, and 72. J. A. 107-108. One test in the records indicated a score of 69, but it was too poorly documented to be considered reliable. J. A. 105-107. The trial court found that Hall had not met either the subaverage intellectual functioning prong or the adaptive deficit prong of the definition of retardation. J. A. 111-112.

On appeal, the Florida Supreme Court reiterated its holding that "a firm cutoff of 70 or below" on an IQ test is required to meet the first prong of the definition of

retardation. See *Hall* v. *State*, 109 So. 3d 704, 707 (2012).

SUMMARY OF ARGUMENT

In evaluating arguments concerning *Atkins* v. *Virginia*, it is important to keep in mind that *Atkins* itself is a rigid cutoff rule in considerable tension with fundamental aspects of this Court's capital sentencing jurisprudence. Since 1976, the Court has held that states are constitutionally required to weigh mitigating circumstances against the aggravating ones and forbidden to give one aggravating factor decisive weight. Yet *Atkins* requires exactly what is forbidden in the other direction, sweeping aside all considerations of how horrible, how depraved, or how premeditated the actual crime may be, instead giving controlling weight to sweeping generalizations about retarded persons that may or may not apply to the individual defendant. A negative *Atkins* finding in a borderline case, where these generalizations are at their weakest, leads only to an individualized sentencing hearing. It is not a result that requires extraordinary efforts to avoid.

Definitions of mental conditions crafted for clinical purposes are not controlling of legal issues in any other area of criminal law. The clinical definition of retardation is based as much on policy and advocacy as it is on science, and it should not be deemed to establish a constitutional standard.

The Standard Error of Measurement (SEM), properly understood, tells us more than just a range of possible "true scores" for a given test score. It tells us about the distribution of probabilities within that range. A test score above 70 establishes a prima facie case that the defendant does not meet the first prong of the definition. If a state wishes to foreclose the use of soft and

subjective evidence to rebut that objective case, that is within the legislative authority as understood with regard to other mental issues in criminal law.

ARGUMENT

I. The *Atkins* rule itself is a rigid cutoff rule, and it must be applied with full awareness of its limitations and its tension with this Court's individualized sentencing jurisprudence.

Petitioner complains that Florida's rule is a rigid cutoff. See Brief for Petitioner 24. There are also complaints in this case that Florida's rule restricts consideration of relevant evidence. See Brief for Former Judges *et al.* as *Amici Curiae* 14. In evaluating these complaints, it is worth keeping in mind that *Atkins* v. *Virginia*, 536 U. S. 304 (2002), itself is a rigid cutoff rule that precludes consideration of highly relevant aspects of the defendant's culpability for the crime, in considerable tension with the principles that this Court has held are constitutionally required in capital sentencing.

For nearly four decades now, this Court has insisted that individualized sentencing is a constitutional imperative in capital cases. See *Woodson* v. *North Carolina*, 428 U. S. 280, 304 (1976) (lead opinion). States have been constitutionally forbidden from identifying a single factor and deciding in advance that the presence of this factor requires a death sentence without that individualized consideration. Even in the exceptionally compelling circumstance of a life-sentenced murderer who kills again within prison, the Court insisted that the Constitution requires consideration of the individual circumstances of the particular case. See *Sumner* v. *Shuman*, 483 U. S. 66, 80-82 (1987).

In *Penry* v. *Lynaugh*, 492 U. S. 302, 322-323 (1989), this Court recognized that mental retardation was a powerful mitigating factor with regard to a defendant's culpability, and it deserved to be weighed in the balance with the other factors. Giving it conclusive weight by itself, however, was not warranted, in part because of the wide variations in abilities among persons who might qualify for the "retarded" label. See *id.*, at 338 (opinion of O'Connor, J.) (quoting AAMR Manual).[2] Both holdings were consistent with the theme of individualized sentencing that has been a central pillar of this Court's capital sentencing jurisprudence from *Woodson* forward.

In *Atkins*, the Court changed course, in part by accepting as if universally true of all retarded persons the sweeping generalities rejected in *Penry*. See 536 U. S., at 318-321. The *Atkins* opinion notwithstanding, it surely is not true that *all* persons diagnosable as retarded *always* act on impulse rather than premediation, *always* follow others rather than lead or act alone, and are *necessarily* so cognitively deficient as to be undeterrable. See Mossman, *Atkins v. Virginia*, A Psychiatric Can of Worms, 33 N. M. L. Rev. 255, 273 (2003). In essence, the *Atkins* Court engaged in the same kind of sweeping generality in disregard of the facts of individual cases that this Court forbade the states to employ in *Sumner*.

There seems to be an implicit theme running through the briefing supporting the Petitioner that, having once been decided, the *Atkins* rule should now be sanctified and fortified without any regard for whether the underlying constitutional principles

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2. Part IV-C of the opinion is not the opinion of the Court, but it is the opinion concurring in the judgment on the narrowest grounds. See *Marks* v. *United States*, 430 U. S. 188, 193 (1977).

actually support the proposed buttresses. To the extent that *Atkins* rests on a generalized characterization of persons with retardation, those sweeping assumptions are at their weakest in the very cases at issue here: the ones near the borderline of qualification for the diagnosis. To the extent that *Atkins* rests on a consensus of the American people that persons with retardation should never be executed regardless of their crimes, that finding of consensus is extremely doubtful as applied to persons at the borderline that most laymen would not recognize as retarded. See *Ex parte Briseno*, 135 S. W. 3d 1, 5-6 (Tex. Crim. App. 2004); see also Covarrubias, Lives in Defense Counsel's Hands: The Problem and Responsibilities of Defense Counsel Representing Mentally Ill or Mentally Retarded Capital Defendants, 11 Scholar 413, 440 (2009) (noting most laypersons think of retarded persons as far more disabled than the mildly retarded actually are).

Finally, it is important to bear in mind that a finding that a person does not qualify for the categorical exemption of *Atkins* does not mean that person will necessarily be sentenced to death. The procedural part of *Penry* is still the law, and capital defendants are still entitled to its protection. Before a murderer can be sentenced to death, he is entitled to a weighing by the sentencer of the aggravating and mitigating facts of his individual case, and his actual mental impairment is a powerful factor in that determination. In such a proceeding, the question of whether an impaired defendant falls slightly on one side or the other side of the retardation line is immaterial. Between *Penry* and *Atkins*, such defendants were sometimes referred to as "retarded" by courts properly weighing their impairments without concern for precise line-drawing. See, *e.g.*, *Bobby* v. *Bies*, 556 U. S. 825, 828 (2009).

The *only* consequence of a negative *Atkins* finding is that the defendant receives an individualized determi-

nation of whether his impairment plus any other mitigation does or does not outweigh the aggravating circumstances of his offense and prior offenses, rather than an outcome mechanically determined by a single factor, ignoring all others. This is not a result that calls for going to extraordinary lengths to avoid, particularly in a borderline case where the rationale for the *Atkins* rule is weakest. On the contrary, this is the path that is *most* likely to lead to a just result in the case. With unbiased justice as the goal, it makes perfect sense to reserve the rigid cutoff rule of *Atkins* for cases where it clearly applies and let the doubtful cases go to individualized sentencing with consideration of all the circumstances.

II. In cases near the borderline, a State may legitimately substitute a more objective definition for the subjective one used in clinical practice.

A. Rules of Law v. Clinical Diagnoses.

In most contexts, *amicus* American Psychiatric Association is adamantly opposed to treating people as a legally distinct class based on a clinical diagnosis. Among the reasons for this position is the variation among individuals that this Court noted in *Penry* v. *Lynaugh*, 492 U. S. 302 (1989). See *supra*, at 6; see also *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 442-443 (1985).

> "Moreover, categorical distinctions based on mental disorder are tantamount to class discrimination because they assume that everyone who has received a particular diagnosis or treatment is identical. In fact, individuals with the same diagnosis or receiving the same treatment may manifest different kinds of symptoms; even when the symptoms are

> the same, they may vary widely in their severity." American Psychiatric Association, Position Statement on Discrimination Against Persons With Previous Psychiatric Treatment, 154 Am. J. Psychiatry 1042 (1997).

Along the same lines, the APA's current Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013) ("DSM-5") contains a "Cautionary Statement for Forensic Use of DSM-5," including this observation:

> "However, the use of DSM-5 should be informed by an awareness of the risks and limitations of its use in forensic settings. When DSM-5 categories, criteria, and textual descriptions are employed for forensic purposes, there is a risk that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis. In most situations, the clinical diagnosis of a DSM-5 mental disorder such as intellectual disability (intellectual development disorder), schizophrenia, major neurocognitive disorder, gambling disorder, or pedophilia disorder does not imply that an individual with such a condition meets legal criteria for the presence of a mental disorder or a specified legal standard (e.g., for competence, criminal responsibility, or disability)." *Id.*, at 25.

The previous edition similarly noted, "The clinical and scientific considerations involved categorization of these conditions as mental disorders may not be wholly relevant to legal judgments, for example, that take into account such issues as individual responsibility, disability determination, and competency." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders xxvii (4th ed. 1994) ("DSM-IV").

In most contexts, the mismatch is obvious. For example, the insanity defense in federal criminal law requires a finding that "the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts." 18 U. S. C. § 17(a). A diagnosis of schizophrenia, see DSM-5, at 99, may be relevant to the determination, but the diagnostic criteria do not match the elements of the defense.

Binding the constitutional rule of *Atkins* to the clinical definition of mental retardation would be particularly inappropriate because this diagnosis is different from a typical medical diagnosis and even from many psychiatric ones. For most disorders, health professions have a keen interest in scientifically precise and accurate diagnosis because it is essential to providing the patient with safe and effective treatment. If a disease is caused by an infecting microbe, a physician must know which one in order to prescribe a medication that actually attacks that microbe. A psychiatrist must accurately diagnose mental disorders to know whether to prescribe an antipsychotic medication or an antidepressant one.

There is no similar constraint on the definition of mental retardation because the diagnosis has generally been used to decide on the provision of supports rather than treatment in the medical sense. The problem of definition is explored from several perspectives in a book published by *amicus* American Association on Intellectual and Developmental Disabilities, then known as American Association on Mental Retardation: H. Switzky & S. Greenspan (eds.) What Is Mental

Retardation? Ideas for an Evolving Disability in the 21st Century (rev. ed. 2006).[3]

> "[Mental retardation], particularly mild MR, is a socially constructed disability category rather than a naturally constructed quasi-medical category. . . .
>
> The term 'disability' originated in the vocational rehabilitation field and is used to indicate that a person needs significant short- or long-term supports in order to be able to hold down a job, if he can at all. It is, thus, a bureaucratic category, usually defined by a committee, which may be influenced by political and economic considerations as much as by 'science,' and *the decision as to where to draw the line* between disability and nondisability, based on an estimate of the amount of supports needed to function normally, *is relatively arbitrary*." Greenspan, Mental Retardation in the Real World: Why the AAMR Definition Is Not There Yet, in WIMR 171 (emphasis added); see also Mossman, 33 N. M. L. Rev., at 265 ("line . . . is a changing and arbitrary one").

Amicus American Bar Association insists the definitions promulgated by "mental disability organizations" are "scientifically recognized" and waxes indignant that the State of Florida has the effrontery to disagree. See Brief for the American Bar Association as *Amicus Curiae* 13-14. In reality, the details of the definition are supported by little science. Critics of the "paradigm shift" in the definition of mental retardation since the 1990s have noted the lack of empirical evidence, see, *e.g.*, Baumeister, Mental Retardation: Confusing

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3. This book is cited below as "WIMR." The subtitle alone is a strong argument against adopting the definition *de jour* as a constitutional mandate. See Brief for Respondent 25-32.

Sentiment with Science, in WIMR at 96, and the influence of advocacy motives.

> "We are solemnly alerted by the Committee [citation] that the paradigm shift 'necessitates . . . significant changes in one's thinking' [citation] and that service delivery now focuses on 'strengths and capabilities of the person, normalized and typical environments, integrated services with supports, and the empowerment of individuals served' [citation]. Quite apart from the obvious imprecision of all this grandiose terminology (or utter inanity, such as 'empowerment'), *blatant and outright advocacy has no standing in construction of a clinical nosology*, no matter how philosophically honorable and well intentioned in principle." *Id.*, at 109-110 (emphasis added); see also MacMillan, Siperstein, & Leffert, Children with Mild Mental Retardation: A Challenge for Classification Practices—Revised, in WIMR at 200 ("designed for the goal of advocacy of a particular ideology").

The psychological association *amici* note that there has been a trend away from reliance on IQ tests in recent years, Brief for American Psychological Association *et al.* as *Amici Curiae* ("APA Brief") 13, but conspicuously absent from their argument is any grounding in solid science for the shift. This is a "trust us, we are the experts" argument. But experts often have agendas, and these associations consistently support the defendant in criminal matters, manipulating their positions as needed to reach the Politically Correct result. See *Roper* v. *Simmons*, 543 U. S. 551, 617-618 (2005) (Scalia, J., dissenting); Mossman, 33 N. M. L. Rev., at 271 (contrasting APA positions in *Atkins* and *Kansas* v. *Hendricks*). There is no reason to trust them and much reason not to.

The definitions, and indeed even the name, of the condition at issue here have varied widely over the years and between organizations because there is little scientific basis for drawing the line at a particular place, no treatment decision to serve as a check, and heavy influence of advocacy motives to affect government decisions. Those decisions have always included the provision of educational and other support services. Since *Atkins*, they now include the decision of whether to hold murderers who rape and torture fully responsible for their crimes, a just result that the associations which write the definitions uniformly oppose. Those definitions should therefore not be elevated to a constitutional mandate, overriding the decision of the people as expressed through the legislative process.

B. Scores, SEM, and the Prima Facie Case.

Amici APA *et al.* explain that in clinical practice a test with an established Standard Error of Measurement (SEM) can be understood to establish a confidence interval around the observed score within which the "true score" may lie. See APA Brief 22-23. That is true enough as far as it goes. Just leaving it at that is potentially misleading, though, because the statistically unsophisticated reader may get the impression that the true score is equally likely to be found anywhere in that interval. That is not remotely close to correct. The true score is very likely at or close to the observed score. The chance of it being in the "tails" is remote, and the chance of it being specifically in the low-end tail is only half of that.

"A *true score* represents that part of an examinee's observed score uninfluenced by random events." Harvill, NCME Instructional Module: Standard Error of Measurement, 10 Educational Measurement: Issues and Practice 33, 33 (Summer 1991). For a theoretical

examinee with a theoretical true score, if we could give many repeated examinations without corrupting the test, *e.g.*, through the practice effect, the observed scores would be distributed approximately along the familiar bell-shaped normal curve, with the true score at the peak. The SEM tells us the width of the curve. See *id.*, at 35.

For the theoretical examinee with a true score of T, the probability of getting an observed score of X or less can be determined by calculating z = (X - T)/SEM and looking up the probability "from the normal curve table in the back of any statistics text." *Id.*, at 36. Using the same formula in the other direction, to estimate the probability distribution of true scores for a given observed score, is not strictly correct, but it is a reasonable approximation sufficient for the present illustrative purpose. See *id.*, at 37.

Table 1 shows the probability, using the above approximation, that an examinee with IQ test scores from 65 to 75 has a true score less than or equal to 70.

Table 1.

Test v. True IQ Probabilities

Test Score X	z = (70 - X)/2.16	Probability T ≤ 70
65	2.31	99.0%
66	1.85	96.8%
67	1.39	91.8%
68	0.93	82.4%
69	0.46	67.7%
70	0.00	50.0%
71	-0.46	32.3%
72	-0.93	17.6%
73	-1.39	8.2%
74	-1.85	3.2%
75	-2.31	1.0%

This table is based on an SEM of 2.16 for the Wechsler Adult Intelligence Scale—Fourth Edition (WAIS-IV). See APA Brief 23. With a test score of 71, it is twice as likely the true score is above 70 as below 70. With a test score of 72, the chance of a true score at or below 70 has dropped below 18%. At 75, the chance is a mere 1%.

Stated in terms of legal adjudication rather than clinical diagnosis, a test score above 70 establishes a prima facie case that the defendant's intellectual functioning is not two standard deviations below the population mean, and therefore he does not qualify for the first prong of the retardation test. The question for state lawmakers to decide is whether to allow this objective prima facie case to be rebutted with the much softer and much more subjective evidence of an evaluation of adaptive functioning. The question for this Court to decide is whether to take this decision out of the hands of state lawmakers and declare it to be embodied in the Eighth Amendment.

For other substantive mental state questions, this Court has generally recognized that the states have broad latitude, even where the question has federal constitutional implications. See Brief for Respondent 23-25 (competence for execution). At times, states have decided to limit consideration to more objective indicia of mental state than might theoretically seem appropriate. For example, in *Montana* v. *Egelhoff*, 518 U. S. 37 (1996), this Court upheld a law that precluded a criminal defendant from showing that he was too drunk to form the mental state required for the crime. For another example, at one time it was common for drunk driving laws to provide that a given blood alcohol level raised a presumption of intoxication, but the defendant could introduce other evidence to prove that he was not actually intoxicated. See *Burg* v. *Municipal Court*, 35

Cal. 3d 257, 262-263, 673 P. 2d 732, 735 (1983). These laws proved inadequate. "Celerity and certainty of punishment were frustrated by the ambiguity of the legal criteria; no matter what his blood-alcohol level, a defendant could escape conviction merely by raising a doubt as to his intoxication." *Id.*, at 263, 673 P. 2d, at 735. States responded by establishing the blood-alcohol level itself as the definition of the crime, *id.*, at 263-264, 673 P. 2d, at 735-736, and such laws are constitutional. See *id.*, at 266-273, 673 P. 2d, at 737-742. The State of Florida has sound reasons for preferring an objective measure, see Brief for Respondent 48-49, and this choice should be within its authority to make even though it produces a different result in a few borderline cases where the justification for the *Atkins* rule is the weakest.

CONCLUSION

The decision of the Supreme Court of Florida should be affirmed.

January, 2014

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

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IN THE

Supreme Court of the United States

FREDDIE LEE HALL,

Petitioner,

v.

FLORIDA,

Respondent.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF FORMER JUDGES AND LAW ENFORCEMENT OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICI CURIAE* [1]

Amici curiae consist of over forty individuals who previously served as federal district court judges, federal appeals court judges, state trial and appellate court judges, United States Attorneys, and state attorneys general. They represent nearly two dozen States from across the country, and include both supporters and opponents of capital punishment, Democrats and Republicans, conservatives and liberals. What unites *Amici* is their fervent dedication to and interest in maintaining the fair administration and public legitimacy of the criminal justice system. The names, former titles, and years of service of these individuals are listed in Appendix A.

As individuals who have dedicated much of their lives to pursuing justice, *Amici* submit this brief in order to address several aspects of Florida's approach to mental retardation that, in addition to running afoul of this Court's precedents, threaten to undermine public confidence in the fair and equal administration of the criminal justice system.

First, although *Amici* believe strongly that the State and local jurisdictions must be given deference in the administration of the criminal justice system, they believe just as strongly that no one State should

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[1] Counsel for all parties have consented to the filing of this brief, and those consents are on file with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *Amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief.

be permitted to enforce the federal constitutional rights of criminal defendants in a manner that undercuts those constitutional protections. Florida's outlier approach to defining the class of persons with mental retardation protected by this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), is inconsistent with that of most other jurisdictions, and raises the prospect that criminal defendants in that State are entitled to lesser Eighth Amendment protections than elsewhere.

Second, although *Amici* are not experts in mental retardation and therefore do not advance any particular definition of mental retardation as the clinical standard, they are keenly interested in ensuring that issues affecting the core Eighth Amendment rights of criminal defendants are litigated and adjudicated in a manner that accounts for all relevant facts. In other Eighth Amendment contexts involving capital punishment, this Court has rejected procedural rules that unduly restrict courts from considering, and advocates from presenting, all relevant evidence bearing on the constitutional prohibition at issue. By making a defendant's intelligence quotient (IQ) test score a strict cutoff in a sentencing court's ability to determine mental retardation, Florida's system runs afoul of these precedents and threatens to undermine the reliability of fact-finding in cases where such reliability is needed most.

SUMMARY OF ARGUMENT

In *Atkins*, this Court invited the States to develop "'appropriate ways to enforce the constitutional restriction'" on executing persons with mental retardation. 536 U.S. at 317. Florida is one of a very few States that requires an IQ test score of 70 or below and otherwise precludes further consideration of evidence of mental retardation under *Atkins*. As a result, a criminal defendant's ability to assert his Eighth Amendment rights as a member of the class protected in *Atkins* is restricted, and the Eighth Amendment prohibition on executing persons with mental retardation applies more narrowly in Florida than it does elsewhere. Florida's approach should be invalidated for the following reasons.

First, Florida's outlier approach to defining mental retardation undercuts the Eighth Amendment right recognized in *Atkins*. This Court has never permitted a State to enforce a constitutional right in a manner that poses a substantial risk of undercutting that right, and it should not allow that to occur here. This is especially true in cases involving matters of life and death, where the need for public respect for and confidence in the criminal justice system is highest.

Second, Florida's approach to *Atkins* claims is procedurally flawed. By requiring an IQ test score of 70 or below and precluding other evidence of mental retardation if that rigid cutoff is not met, Florida's approach unduly restricts the consideration and introduction of other relevant evidence of mental

retardation. In other Eighth Amendment contexts involving capital punishment, including those in which difficult expert- and fact-intensive findings must be made, this Court has rejected procedural rules that unduly restrict courts from considering, and advocates from presenting, relevant evidence bearing on the constitutional prohibition at issue. These precedents recognize the paramount need for reliability in cases involving life and death. The Florida system ignores the teachings of these precedents and creates a risk that individuals protected by the Eighth Amendment will nevertheless be executed.

Finally, Florida's outlier approach undermines public confidence in the criminal justice system. That public confidence depends on the belief that core constitutional rights under the Eighth Amendment mean the same thing in different jurisdictions. Florida's approach here undercuts that public confidence by redefining the Eighth Amendment right recognized in *Atkins*, and arbitrarily precluding individuals who may have mental retardation from being able to present relevant evidence in support of their claims.

ARGUMENT

I. FLORIDA'S OUTLIER APPROACH TO DEFINING MENTAL RETARDATION IS INCONSISTENT WITH THIS COURT'S PRECEDENTS, INCLUDING *ATKINS*, AND UNDERMINES RESPECT FOR THE CRIMINAL JUSTICE SYSTEM

Since *Atkins* was decided, the States have developed different ways to "enforce the constitutional restriction" on executing persons with mental retardation. Florida is one of very few states that has required an IQ test score of 70 or below and treated such a score as a strict cutoff, absent which introduction of other evidence of mental retardation is precluded. This outlier approach has restricted the ability of criminal defendants in Florida to assert *Atkins* claims, with the result that the Eighth Amendment prohibition against executing persons with mental retardation applies more narrowly there than in other jurisdictions. Such disparity is not only inconsistent with this Court's Eighth Amendment jurisprudence, including *Atkins*, but also threatens to undermine public respect for the criminal justice system.

A. Among the States, Florida Has Taken an Unduly Restrictive Approach to Defining Mental Retardation Under *Atkins*

In recognizing an Eighth Amendment prohibition on executing persons with mental retardation, this Court cited clinical definitions of mental retardation that "requir[ed] not only

subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18." *Atkins*, 536 U.S. at 318. Those definitions each recognized that an IQ test score of 70 or below is not necessary for a diagnosis of mental retardation. *Atkins* indicated that "'[m]ild' mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70," *id.* at 308 n.3, and that "an IQ between 70 and 75 or lower . . . is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition," *id.* at 309 n.5.

Since *Atkins* was decided, the States have developed varying "ways to enforce the constitutional restriction" on executing persons with mental retardation. *Id.* at 317. While this variation has included different procedural means of "enforc[ing]" the Eighth Amendment prohibition,[2] a

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[2] *See* Carol S. Steiker & Jordan M. Steiker, Atkins v. Virginia: *Lessons from Substance and Procedure in the Constitutional Regulation of Capital Punishment*, 57 DePaul L. Rev. 721, 724-25 (2008) (describing variation that "exists in the procedures used to determine whether a defendant is mentally retarded, including whether the ultimate decisionmaker should be judge or jury, whether the state or the defendant should bear the burden of proof, and whether the determination should be made pretrial or post-trial."); John H. Blume et al., *Of* Atkins *and* Men: *Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 Cornell J. L. & Pub. Pol'y 691, 693-94 (2009) (describing *Atkins* as giving states authority over the procedures used to implement the

number of States have also – statutorily or by case law – expressly incorporated IQ test scores into the definition of mental retardation for purposes of their capital sentencing schemes. *See* Petitioner's Brief, Appendix B (describing approaches taken by the States to defining mental retardation).

Of these approaches, Florida stands with only a few other States in both (1) defining mental retardation in terms of an IQ test score no higher than 70 and (2) using this IQ test score as a strict cutoff precluding the consideration of other evidence of mental retardation. Thus, in Florida, if a defendant cannot demonstrate an IQ test score of 70 or below (*i.e.*, without accounting for any standard error of measurement), he may not present any other evidence of mental retardation for purposes of advancing an *Atkins* claim.[3] By failing to account for the standard error of measurement in measuring IQ, and then using an IQ test score of 70 as a rigid (and arbitrary) cutoff, Florida departs not only from the clinical definition of mental retardation set forth

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(continued...)

categorical exemption, "such as whether determinations of mental retardation should be made by a judge or by a jury, whether determinations should occur before or after guilt-innocence trials, which party bears the burden of proof, and what entitles a mental retardation claim to an evidentiary hearing or bars it by procedural default.") (footnotes omitted).

[3] *See* Fla. Stat. Ann. § 921.137(1) (2012); *Cherry v. State*, 959 So. 2d 702, 712-14 (Fla. 2007) (per curiam).

in *Atkins*, but from the approach taken by the vast majority of other jurisdictions.

The result is that the Eighth Amendment protection applies more narrowly to a criminal defendant simply by virtue of being prosecuted in Florida as opposed to another less restrictive jurisdiction. A defendant with an IQ test score of 71 might qualify as having mental retardation in California (a state with no bright-line IQ test score cutoff that instead takes into account the standard error of measurement inherent in the test), but not in Florida. *See Cherry v. State*, 959 So. 2d 702, 712-14 (Fla. 2007) (per curiam).

B. While States Can Develop Differing Procedural Mechanisms to Enforce a Constitutional Right, They May Not Redefine the Right Itself

Empowering the States to develop their own approaches to enforcing constitutional rights can be advantageous, as the States play an important role "as laboratories for devising solutions to difficult legal problems." *Oregon v. Ice*, 555 U.S. 160, 171 (2009); *see generally* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 Yale L.J. 1256, 1261 (2009) ("State autonomy helps create laboratories of democracy, diffuse power, foster choice, safeguard individual rights, and promote vibrant participatory opportunities for citizens." (footnotes omitted)). Yet, to be workable, such delegation requires the articulation of at least some constitutional "minimum," whether expressed in substantive or procedural terms. *See Panetti v.*

Quarterman, 551 U.S. 930, 950 (2007) ("the state court failed to provide petitioner with the minimum process required by *Ford*"); *Danforth v. Minnesota*, 552 U.S. 264, 288 (2008) (stating that federal constitutional law "'sets certain minimum requirements that States must meet but may exceed in providing appropriate relief.'" (internal citation omitted)). Without some constitutional minimum, the States could adopt such divergent approaches to enforcing the constitutional right at issue that that right would lose coherent meaning or force. *Cf. id.* at 280 ("There is, of course, a federal interest in reducing . . . disuniformity in the application of federal law." (internal quotations omitted)); *Thompson v. Keohane*, 516 U.S. 99, 113, n.13 (1995) (describing benefit of "advancing uniform outcomes" and reducing "the area of uncertainty" regarding cherished constitutional rights).

In the Eighth Amendment context in particular, this Court has recognized that, while States may adopt their own procedural mechanisms to enforce a constitutional right, they may not redefine the substance of the right itself. Thus, since *Furman v. Georgia*, 408 U.S. 238 (1972), this Court has imposed various categorical restrictions under the Eighth Amendment on a State's power to impose capital punishment. Yet, in none of these cases has this Court ever held or suggested that an individual State may redefine who or what falls within the protected category.

This is true of the line of cases holding that the Eighth Amendment forbids application of the death penalty to certain crimes. *See Coker v. Georgia*, 433

U.S. 584, 592 (1977) (plurality opinion) (holding that "a sentence of death [was] grossly disproportionate and excessive punishment for the crime of rape [of an adult woman] and [was] therefore forbidden by the Eighth Amendment as cruel and unusual punishment"); *Enmund v. Florida*, 458 U.S. 782, 787 (1982) (holding death was not a "valid penalty" for a defendant "who neither took life, attempted to take life, nor intended to take life"); *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008) (holding that "a death sentence for one who raped but did not kill a child, and who did not intend to assist another in killing the child, [was] unconstitutional under the Eighth and Fourteenth Amendments").

It is also true of this Court's precedents proscribing the execution of certain types of offenders. In *Roper v. Simmons*, 543 U.S. 551 (2005), for example, where this Court held that "the death penalty is a disproportionate punishment for juveniles," *id.* at 564, the Court did not leave to the States the task of defining which offenders are "juveniles." Rather, it announced a uniform rule that no offender who was under the age of 18 when he committed his crime could be subject to execution. *Id.* at 568 ("A majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment.").

Although certain categories of crimes or offenders protected under the Eighth Amendment may be more difficult to delineate than others, the Court has never suggested that individual States may draw those lines in ways that vitiate the force of

those constitutional protections. As this Court stated in *Kennedy*, "The National Government and, beyond it, the separate States are bound by the proscriptive mandates of the Eighth Amendment to the Constitution of the United States, and *all* persons within those respective jurisdictions may invoke its protection." 554 U.S. at at 412 (emphasis added).

Ford v. Wainwright, 477 U.S. 399 (1986) – a case cited in *Atkins* for the proposition that States should be given "'the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences,'" *Atkins*, 536 U.S. at 317 (quoting *Ford*, 477 U.S. at 416-417) – provides no exception to this rule. In *Ford*, a majority of the Court held that "the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." 477 U.S. at 409-10. A four-Justice plurality then considered whether the State's procedures for determining sanity were adequate to preclude federal redetermination of the constitutional issue, ultimately determining that they were not. *Id.* at 416. The Court then stated:

> We do not here suggest that only a full trial on the issue of sanity will suffice to protect the federal interests; we leave to the State the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences. It may be that some high threshold showing on behalf of the prisoner will be found a necessary means to control the number of nonmeritorious or repetitive claims of insanity. *Cf. Pate v.*

> *Robinson*, 383 U.S. 375, 387 (1966) (hearing on competency to stand trial required if "sufficient doubt" of competency exists). Other legitimate pragmatic considerations may also supply the boundaries of the procedural safeguards that feasibly can be provided. [¶] Yet the lodestar of any effort to devise a procedure must be the overriding dual imperative of providing redress for those with substantial claims and of encouraging accuracy in the factfinding determination.

Id. at 416-17 (plurality opinion).

This passage demonstrates the *Ford* plurality's view that the States should be allowed to develop various *procedures* to enforce the constitutional right, not that they should be allowed to define the substance of the right itself. [4] While the majority in

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[4] The distinction between substance and procedure is a familiar one. When construing the Rules Enabling Act, for instance, this Court has understood procedure to be "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Hanna v. Plumer*, 380 U.S. 460, 464 (1965) (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)). Or, in another formulation, rules of procedure govern "the manner and the means" by which the litigants' rights are "enforced," whereas substance goes to "the rules of decision by which [the] court will adjudicate [those] rights." *Id.* at 465 (quoting *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 446 (1946)). Of course, the distinction between substance and procedure has very different implications in the present case as opposed to in the context of Rules Enabling Act. An *Atkins* claim, even if initially heard pursuant to state process in state court, is both federal and

Ford did not articulate a precise definition of "insanity," the Court later clarified that a prisoner must have at least a "rational understanding of the reason for the execution" before he may be put to death. *Panetti*, 551 U.S. at 958. The principles announced in *Panetti* – while not purporting to "set down a rule governing all competency determinations," *id.* at 960-61 – nevertheless provided a sufficient constitutional minimum against which to evaluate potential violations of the core right.

Atkins, as properly interpreted, is entirely consistent with these precedents. Quoting from the *Ford* plurality opinion, *Atkins* invited the States to determine for themselves the best procedural mechanisms to enforce the substantive constitutional right – not to re-define the constitutional right itself. To interpret *Atkins* otherwise would cede to Florida what is the exclusive province of this Court – "to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803).

(continued...)

substantive in nature. Therefore, federal substantive law must control.

C. Florida's Outlier Approach to Mental Retardation Improperly Redefines the Constitutional Right Recognized in *Atkins* By Unduly Restricting the Consideration of Relevant Evidence

Amici are not experts in mental retardation and therefore will not repeat the discussion in the Petitioner's Brief addressing how Florida's approach departs from the established clinical definition of mental retardation. (Petitioner's Br. 25-30, 34-43). Instead, *Amici* focus on a related structural flaw in Florida's approach that is of particular concern to them.

Under Florida's approach, a defendant must show an obtained IQ test score of 70 or below as a strict threshold requirement in the court's consideration of whether a defendant falls within the class of individuals protected in *Atkins*. If that threshold requirement is not satisfied, the fact-finder may not consider any other evidence of mental retardation. The imposition of such a threshold requirement need not necessarily be problematic, if set high enough to ensure that no potential members of the protected class will be excluded. In this case, however, Florida has established a threshold requirement that defendant possess an IQ test score no higher than 70, notwithstanding the *Atkins* Court's recognition that persons with mental retardation can have IQ test scores as high as 75. Regardless of what that cutoff should be, it is undisputed that an individual who tests above that cutoff could in fact possess an IQ below the cutoff, due to the inherent error of measurement in IQ

testing. Yet in Florida, such individuals are precluded from offering, and courts are precluded from considering, any additional evidence of mental retardation as a result of their above-70 test score.

Thus, it is not simply the specific IQ test score that Florida has adopted to form the outer limits of "subaverage intellectual functioning," but the fact that that IQ score is used as a gatekeeper to preclude the introduction of any further evidence (whether relating specifically to IQ or to the other components of mental retardation discussed in *Atkins*) that is problematic. As this Court emphasized in *Atkins*, and as is consistent with the established clinical view, mental retardation cannot be reduced solely to a defendant's measurable intelligence, but also involves "significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18." *Atkins*, 536 U.S. at 318. In Florida, however, evidence with respect to those other elements of mental retardation cannot be admitted by a claimant to inform the fact-finder's analysis, even with respect to individuals possessing an IQ test score within the upper range for mental retardation (70 to 75) recognized in *Atkins*.

This Court's approach in *Ford*, 477 U.S. 399, and *Panetti*, 551 U.S. 930, helps illuminate the deficiencies in Florida's system. In those cases, this Court explained how, once a defendant has made a threshold showing of insanity, he becomes entitled under the Eighth Amendment (as incorporated by the Fourteenth Amendment) to certain basic procedural due process, including a "full hearing" at

which the defendant can submit evidence and argument, in accordance with fundamental fairness. *Ford*, 477 U.S. at 426 (plurality opinion); *Panetti*, 551 U.S. at 949. In *Panetti*, this Court found that the petitioner had been denied this due process right, when he was not given an adequate opportunity to submit expert evidence in response to a report filed by a court-appointed expert. *See id.* at 949-50.

Although the procedural defect and substantive matter (mental incompetency as opposed to mental retardation) at issue in *Panetti* differ from those here, this Court's reasoning in *Panetti* is nevertheless instructive. That decision indicated that, while it may be permissible to require a defendant to make a threshold showing of membership in a protected Eighth Amendment class, that requirement cannot be set so high as to exclude potentially meritorious claims and members. And once the threshold showing has been made, a state may not unduly restrict what evidence can be presented as to whether a defendant falls within the protected class. This seems particularly true where, as was the case in *Panetti*, a fact-finder must resolve complex and nuanced psychological issues. In part for these reasons, the *Panetti* Court, while hesitant "to set down a rule governing all competency determinations," nevertheless rejected as unduly restrictive the state's "strict test for competency." 551 U.S. at 960-61. The same is true of the strict IQ test score requirement that Florida purports to impose on *Atkins* claims.

Florida's strict IQ test score cutoff also ignores the teachings of this Court's decisions in *Lockett v. Ohio*, 438 U.S. 586 (1978), and its progeny. These cases emphasize the need in capital cases – where reliability is paramount – for sentencers to be able to evaluate all relevant evidence of a defendant's character and record. *See id.* at 602-03 ("[W]here sentencing discretion is granted, it generally has been agreed that the sentencing judge's 'possession of the fullest information possible concerning the defendant's life and characteristics' is 'highly relevant – *if not essential* – to the selection of an appropriate sentence." (quoting *Williams v. New York*, 337 U.S. 241 (1949)); *Johnson v. Texas*, 509 U.S. 350, 361 (1993) ("*Lockett* and its progeny stand only for the proposition that a State may not cut off in an absolute manner the presentation of mitigating evidence, either by statute or judicial instruction, or by limiting the inquiries to which it is relevant so severely that the evidence could never be part of the sentencing decision at all." (quoting *McKoy v. North Carolina*, 494 U.S. 433, 456 (1990) (Kennedy, J., concurring)). Under these precedents, States may not bar the consideration of such evidence – including specifically evidence of mental retardation – "if the sentencer could reasonably find that it warrants a sentence less than death." *Tennard v. Dretke*, 542 U.S. 274, 284-85 (2004) (quoting *McKoy*, 494 U.S. at 441) (invalidating Texas's imposition of a "constitutional relevance" screening test for the

admissibility of mitigating evidence of mental retardation).[5]

Florida, however, precludes the introduction of relevant evidence of mental retardation simply because the defendant's obtained IQ test score is above 70. Given that such a defendant could still possess "significantly subaverage intellectual functioning," as defined in *Atkins*, Florida's failure to consider additional evidence of mental retardation, however strong, undermines the reliability of *Atkins* proceedings in Florida. If this Court was correct in the line of cases beginning with *Lockett* that, given the paramount need for reliability in capital cases, the Eighth Amendment requires sentencers to have access to all available evidence in assessing a defendant's character, there is no reason not to apply this same insight and logic to the question whether that defendant falls into the category of protected individuals recognized in *Atkins*.

Florida's general sentencing procedures in capital cases also show why removing Florida's strict IQ cutoff would not overwhelm sentencing courts

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[5] Consistent with these precedents, Florida accords defendants wide latitude to raise as a mitigating factor "any aspect of [his or her] character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Fla. Stat. § 921.141(6)(h) (allowing consideration as mitigating factor of "any other factors in the defendant's background that would mitigate against imposition of the death penalty").

with irrelevant information, for courts in Florida (and elsewhere) already must consider all mitigating information available about a defendant's character, under *Lockett*. Nor would the removal of a strict IQ cutoff prevent courts from closely scrutinizing *Atkins* claims to determine whether the claimants really do fall within the protected class. What removing Florida's strict IQ test score cutoff would do is allow sentencing courts to consider all of the relevant evidence about a defendant that is before them in determining whether the defendant has a valid *Atkins* claim. Precluding a sentencing court from being able to consider such additional evidence simply because a defendant's obtained score is over 70 is not only arbitrary but threatens to the undermine the reliability of fact-finding in cases where such reliability is needed most. *See California v. Brown*, 479 U.S. 538, 541 (1987) ("The Constitution . . . requires that death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion."); John H. Blume et al., *Of* Atkins *and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 Cornell J. L. & Pub. Pol'y 691, 689 (2009) (imposing death penalty on individuals who are in fact constitutionally ineligible would be "intolerable under the Eighth Amendment, which demands consistency and non-arbitrary application of punishment").

D. Florida's Outlier Approach Threatens to Undermine Public Confidence in the Criminal Justice System

Florida's outlier approach to defining mental retardation is not only inconsistent with this Court's precedents, but also threatens to undermine public confidence in and respect for the criminal justice system. Such public confidence and respect requires that the criminal justice system – and capital punishment, which the vast majority of States authorize – be administered in a manner that is not only fair but, just as importantly, broadly perceived as such. *See Kennedy*, 554 U.S. at 436 (describing need to "ensure consistency in determining who receives a death sentence.").

Such public confidence is, particularly with respect to capital punishment, already somewhat fragile. According to a recent poll, only fifty-two percent of Americans believe the death penalty is applied fairly, while forty percent believe it is applied unfairly. *See* Jeffrey M. Jones, *U.S. Death Penalty Support Lowest in More than 40 years*, Gallup Politics (Oct. 29, 2013), http://www.gallup.com/poll/165626/death-penalty-support-lowest-years.aspx. These figures reflect "deep[] concern[] about the risk of executing the innocent, about the fairness of the process, and about the inability of capital punishment to accomplish its basic purposes." Death Penalty Information Center, *A Crisis of Confidence: Americans' Doubts About the Death Penalty* 1 (June

2007), http://www.deathpenaltyinfo.org/CoC.pdf. [6] The negative publicity generated when offenders diagnosed with mental retardation are executed suggests that concerns regarding the fairness of capital punishment are particularly acute whenever the defendant in question suffers from a mental impairment or defect.[7]

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[6] Concerns about wrongful executions are particularly prevalent. Eighty-seven percent of Americans, for example, believe that innocent people have been executed in recent years. *See* Death Penalty Information Center, *supra*, at 5. Even in Texas, a state where support for the death penalty is relatively strong, one in eight people believes that wrongful death penalty convictions take place "a great deal of the time." Ross Ramsey, *UT/TT Poll: Texans Distrust Big Institutions on Privacy*, The Texas Tribune (Nov. 8, 2013), http://www.texastribune.org/2013/11/08/uttt-poll-texans-dont-trust-institutions-privacy/.

[7] *See, e.g.*, Lindsay C. Harrison, *Although Supreme Court Ruled It Unconstitutional, Georgia Inmate Has Hours to Live*, USA Today, July 14, 2013, http://www.usatoday.com/story/opinion/2013/07/14/mentally-retarded-inmate-death-penalty-column/2512025/; Trymaine Lee, *'Mentally Retarded' Killer Denied Stay of Execution*, MSNBC, July 10, 2013, http://www.msnbc.com/news-nation/mentally-retarded-killer-denied-stay-exe; Andrew Cohen, *Executing the Mentally Handicapped Is Illegal – Except When It Isn't*, The Atlantic, Apr. 23, 2013, http://www.theatlantic.com/national/archive/2013/04/executing-the-mentally-handicapped-is-illegal-except-when-it-isnt/275219/; Jordan Smith, *Smart Enough to Die*, The Austin Chronicle, Apr. 19, 2013, http://www.austinchronicle.com/news/2013-04-19/smart-enough-to-die/; David R. Dow, *Supreme Court Outlawed Executing Mentally Retarded, But Texas Does It Anyway*, The Daily Beast, Aug. 14, 2012, http://www.thedailybeast.com/articles/2012/08/14/supreme-cou

The public's confidence in the fair nationwide administration of capital punishment, and of the criminal justice system more generally, could be further undermined were this Court to permit Florida to re-define the Eighth Amendment right recognized in *Atkins* in a manner that arbitrarily excludes members of the protected class. The public is entitled to believe that the fundamental protections of the Eighth Amendment should not waver depending on where a defendant happens to be prosecuted.

CONCLUSION

For all of the foregoing reasons, *Amici* urge the Court to reverse the decision below.

(continued...)

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APPENDIX

APPENDIX A

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AMICUS CURIAE BRIEF

MOTION FILED
RECORD DEC 19 2013
AND
BRIEFS

No. 12-10882

IN THE SUPREME COURT OF THE UNITED STATES

FREDDIE LEE HALL,
PETITIONER
v.

STATE OF FLORIDA,
RESPONDENT

ON WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

MOTION OF PROFESSORS ADAM LAMPARELLO AND CHARLES MACLEAN FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF AND BRIEF IN SUPPORT OF NEITHER PARTY

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37.3(b), Professors Adam Lamparello and Charles MacLean respectfully move to file the attached brief as *amicus curiae* in support of neither party. Counsel for Petitioner Freddie Hall has withheld consent, and counsel for Respondent State of Florida has not responded to our request for consent.

Adam Lamparello and Charles MacLean are assistant professors of law at Indiana Tech Law School in Fort Wayne, Indiana. Professor Lamparello practices, teaches, and publishes in the areas of criminal and constitutional law. His scholarly publications address, among other things, the impact that brain impairments such as frontal lobe disorder have upon impulse control and moral reasoning.

Professor MacLean is a former Chief Prosecutor at the Winona County Attorney's Office in Winona, Minnesota, where he prosecuted violent felonies, provided legal advice to government personnel, and spoke widely on topics involving criminal procedure. Professor MacLean was an Assistant Professor of Law at Lincoln Memorial University's Duncan School of Law in Nashville, Tennessee, Saint Mary's University in Winona, Minnesota, William Mitchell College of Law in St. Paul, Minnesota, and Winona State University in Winona, Minnesota. Professor MacLean has taught courses in criminal law, the death penalty, and trial and appellate advocacy. Professor MacLean also

edited and published a book on capital punishment in 2013.

Professors Lamparello and MacLean believe that this case presents the court with an opportunity to clarify *Atkins v. Virginia* and provide additional guidance to the states regarding the processes for determining whether a defendant is intellectually disabled.

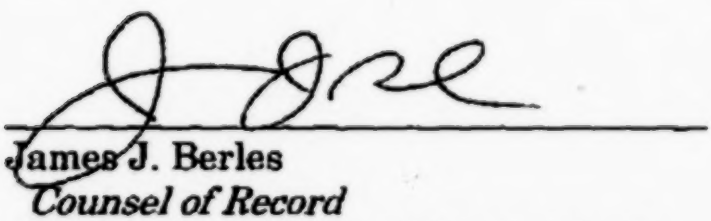
Based on their experience as practitioners and scholars, Professors Lamparello and MacLean believe that Fla. Stat. § 921.137(1), which the Florida Supreme Court has interpreted as barring evidence of adaptive disability for defendants with an IQ of 70 or above, is inconsistent with *Atkins*.

As discussed in the attached brief, *Atkins* identified three areas of cognitive functioning that are relevant to a determination of intellectual disability: subaverage intellectual functioning, evidence of adaptive disability, and onset prior to the age of eighteen. Professors Lamparello and MacLean believe that this three-pronged definition appropriately reflects the fact that intellectual disability is not adequately captured by an IQ score alone. Thus, interpreting Section 921.137(1) to include an "IQ cutoff," is contrary to both *Atkins* and the individualized consideration that this Court's death penalty jurisprudence demands.

Professors Lamparello and MacLean base their conclusion on modern scientific evidence concerning intellectual disability and on an analysis of the Court's precedent prior to and following *Atkins*.

Accordingly, Professors Lamparello and MacLean respectfully request that the Court grant the motion for leave to file the attached brief as *amicus curiae.*

Respectfully submitted,



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487 U.S. 815 (1988) 9

Trop v. Dulles,
356 U.S. 86 (1958) 3

Van Tran v. State,
66 S.W.3d 790 (Tenn. 2001) 2

Statutes

Fla. Stat. § 921.137 .....ii, 1-5, 11-12, 14-17

U.S. Const. amend. V 5

U.S. Const. amend. VIII 5

U.S. Const. amend. XIV 5

Other Authorities

Diagnostic and Statistical Manual of Mental
Disorders 37 (5th ed. 2013) 5

Geraldine W. Young, "A More Intelligent and Just Atkins: Adjusting for the Flynn Effect in Capital Determinations of Mental Retardation or Intellectual Disability," 65 VAND. L. Rev. 615 (2012) 5, 6

John Fabian, "Forensic Neuropsychological Assessment and Death Penalty Litigation," THE CHAMPION, Apr. 2009 10

Mental Retardation: Definition, Classification, and Systems of Supports 80 (10th ed. 2012) 4

Note, "Defining Intellectual Disability and Establishing a Standard of Proof: Suggestions for a National Model Standard," 23 HEALTH MATRIX 317 2

Peggy M. Tobolowsky. "A Different Path Taken: Texas Capital Offenders' Post-Atkins Claims of Mental Retardation," 39 HASTINGS CONST. L.Q. 1 (2011) 2

Richard J. Bonnie, Katherine Gustafson, "The Challenge of Implementing Atkins v. Virginia: How Legislatures and Courts Can Promote Accurate Assessment and Adjudications of Mental Retardation in Death Penalty Cases," 41 U. RICH. L. REV. 811 (2007) 6

INTEREST OF THE AMICUS CURIAE[1]

Professors Lamparello and MacLean seek to aid the Court in arriving at a just result that balances the Petitioner's interests in liberty and fairness with Respondent's interest in the orderly administration of criminal law. In so doing, they have an interest in the sound development of law in this area, and the equitable administration of justice.

SUMMARY OF THE ARGUMENT

The tension in this case is between bright-line rules and deference to state legislatures. The tiebreaker, Professors Lamparello and MacLean submit, is "individualized consideration."[2]

Section 921.137(1)[3] adopts language that arguably complies with *Atkins v. Virginia*,[4] but has been interpreted in a manner that violates *Atkins*. In

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[1] Counsel for Petitioner has withheld consent in this matter, and counsel for Respondent has not replied to our request for consent, which was sent to counsel for both parties on December 4, 2013. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Indiana Tech Law School provides financial support for faculty research and scholarship, which facilitated the filing of this brief. (The Law School is not a signatory to this brief, and the views expressed here are solely those of the *amicus curiae*). Otherwise, no person or entity other than the *amicus curiae* or their counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

[2] Miller v Alabama, 132 S. Ct. 2455, 2469-70 (2012) (a juvenile case); Roper v Simmons, 543 U.S. 551, 572 (2005) (a juvenile case).

[3] Fla. Stat. § 921.137(1) (2012).

[4] 536 U.S. 304 (2002).

Hall, the Florida Supreme Court interpreted 921.137(1) to contain an "IQ cutoff" of 70. As such, if a defendant does not score below 70 on an IQ test,[5] Section 921.137 precludes consideration of adaptive function,[6] which was expressly recognized in *Atkins*, and is well-recognized in the scientific community, as germane to a finding of intellectual disability. Florida's cutoff is particularly troublesome given that an IQ of up to 75 constitutes evidence of subaverage intellectual functioning. *Atkins*, 536 U.S. at 309, n. 5.

By adopting the definition of mental retardation used by most clinicians, *Atkins* implicitly requires that adaptive function, *e.g.*, social and interpersonal skills, be considered in the intellectual disability determination. And for good reason. Adaptive functioning is part of a modern understanding of intellectual disability—relied upon in *Atkins*—that recognizes the link between real-world functioning and intellectual disability.

The Florida Supreme Court's interpretation of Section 921.137(1), however, allows an IQ score to

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[5] IQ tests are typically given on the Wechsler and Stanford Binet Intelligence Scales. *See* Peggy M. Tobolowsky. *"A Different Path Taken: Texas Capital Offenders' Post-Atkins Claims of Mental Retardation,"* 39 HASTINGS CONST. L.Q. 1, 7 (2011).

[6] Adaptive functioning generally refers to limitations in at least two of the following basic skills: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety." Note, *"Defining Intellectual Disability and establishing a Standard of Proof: Suggestions for a National Model Standard,"* 23 HEALTH MATRIX 317, 330 (quoting Van Tran v. State, 66 S.W.3d 790, 785 (Tenn. 2001)).

end the inquiry and exclude adaptive behavior from consideration. Neither *Atkins* nor the due process guarantees under the Fifth and Fourteenth Amendments contemplate a system where one factor works to exclude the others. This is particularly true when at least one of the other factors—adaptive behavior—is arguably more probative than a single number or test.

Thus, even if the current interpretation of Section 921.137(1) does not violate the letter of *Atkins,* which charged states with developing procedures for determining intellectual disability, it certainly violates its spirit, which called for a more individualized—and comprehensive—scheme. 536 U.S. 304, 318 (2002).

Since "[d]eath is different," the process for determining who can be executed should also be different. *Ring v. Arizona,* 536 U.S. 548, 606 (2002 (citation omitted). Put differently, "evolving standards of decency as evidenced by a maturing society" contemplate not only the right result, but the proper path to that result. *Trop v. Dulles,* 356 U.S. 86, 100-01 (1958). When interpreted in this context, the Florida Supreme Court's interpretation of Section 921.137(1) does not withstand the reasoning in *Atkins,* the changes it sought to achieve, and the safeguards it endeavored to create.

The problem with IQ cutoffs is caused by IQ measurement itself. Like bright-line rules themselves, IQ is admittedly arbitrary. For that and other reasons, an IQ cutoff of 70 over-values the significance of an IQ score, and under-values other

areas of intellectual function that relate directly to culpability and moral responsibility. *See, e.g., O'Neal v. Bagley*, 728 F.3d 552, 565 (6th Cir. 2013) (Merritt, J., dissenting) ("[t]he American Association on Mental Retardation specifically cautions against a fixed cutoff...[the] imbalance between intelligence and adaptive behavior does not represent the current conceptualization of mental retardation") (quoting Mental Retardation: Definition, Classification, and Systems of Supports 80 (10th ed. 2012)).

There is, of course, a place for bright-line rules. In the death penalty context, categorical rules such as an IQ cutoff can withstand constitutional scrutiny if they protect individuals who *should not be executed*, even if such a rule would encompass defendants who otherwise *could have been executed.* An over-inclusive rule, however, imprecise, still protects those that it was intended to protect. It errs on the side of caution.

To the contrary, a bright-line rule that protects defendants who *should not be executed*, but allows other defendants—who may be similarly or, worse, *more* impaired than those in the protected class—*to be executed,* does the opposite. In this situation, the bright-line rules protects only a portion of the class to which *Atkins* spoke. Given the considerations expressed in *Atkins*, erring on the side of caution is the proper way to realize individualized consideration.

In this regard, the Florida Supreme Court's interpretation of Section 921.137(1) is unjust. It represents a "dogged adherence to a bright-line cutoff

of a 70 on an IQ test," and does not reflect "the current understanding that a broader approach produces a more accurate assessment of mental retardation than a heavy reliance on IQ scores."[7] *Hall v. State*, 109 So. 3d 704, 718 (2012) (Perry, J. dissenting); *O'Neal*, 728 F.3d at 565 (Merrit, J., dissenting) (reflecting the Diagnostic and Statistical Manual of Mental Disorders 37 (5th ed. 2013)).

The Florida court's interpretation is, therefore, contrary to *Atkins*, the Eighth Amendment's Cruel and Unusual Punishment Clause, and the liberty interests contained within the Fifth and Fourteenth Amendments to the United States Constitution. *See*, U.S. Const. amends. V, VIII, and XIV, cl. 1.

Importantly, Professors Lamparello and MacLean respectfully submit that this Court should issue a narrow ruling that clarifies *Atkins* and results in a more balanced approach to mental disability determinations under Florida law. Under prong one, a strict IQ cutoff of 70 should not be used to determine sub-average intellectual functioning, even though sub-average functioning itself is admittedly defined as two standard deviations from the average score. [8] This ignores the fact that IQ is an approximation (and typically expressed as a

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[7] Geraldine W. Young, *"A More Intelligent and Just Atkins: Adjusting for the Flynn Effect in Capital Determinations of Mental Retardation or Intellectual Disability,"* 65 VAND. L. REV. 615, 648 (2012) ("no real difference exists between IQ scores of 69 and 71").

[8] Section 921.137(1) defines sub-average intellectual functioning as "performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities."

range), disregards the statistical insignificance of a 1 or 2 point difference in an IQ score, and fails to account for the "Flynn effect."[9]

Amici are not positing that IQ is irrelevant, but that its use becomes problematic when it is relied on to effectively preclude a more searching and individualized inquiry of intellectual disability.[10] Bright line rules have their place, but not when they are used in a manner that makes death *less* different, and makes the execution of those with intellectual disabilities *more* likely.

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[9] Young, *supra* note 7, at 644-45, 648 (2012) ("IQ scores are relative, not absolute, measurements that serve as 'approximate' indicators of a person's IQ," and do not take into account the well-known "Flynn effect.").

[10] To be clear, adaptive behavior is distinct from intellectual capacity, and not among the skills measured by administration of standard intelligence tests. *See* Richard J. Bonnie, Katherine Gustafson, *"The Challenge of Implementing Atkins v. Virginia: How Legislatures and Courts Can Promote Accurate Assessment and Adjudications of Mental Retardation in Death Penalty Cases,"* 41 U. RICH. L. REV. 811 845-46 (2007) (Adaptive behavior was added to the AAMR definition in 1959 in order to reflect the social characteristics of mental retardation, to reduce reliance on IQ scores in diagnoses and incorporate evidence of functioning in the real world, and to decrease the number of people falsely identified as having mental retardation").

ARGUMENT

ATKINS IMPLICITLY REQUIRES THAT INTELLECTUAL FUNCTION AND ADAPTIVE BEHAVIOR BE CONSIDERED IN THE DETERMINATION OF INTELLECTUAL DISABILITY

A. UNDER *ATKINS*, MENTAL DISABILITY IS MUCH MORE THAN AN IQ SCORE.

In *Atkins*, this Court held, in light of "our 'evolving standards of decency,'" that "death is not a suitable punishment for a mentally retarded criminal." 536 U.S. at 321.[11] The Court found, *inter alia*, that the intellectually disabled were *less culpable* than other offenders, and thus not among those who commit 'a narrow category of the most serious crimes' and whose *extreme culpability* makes them 'the most deserving of execution.' " *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (quoting *Atkins*, 536 U.S. at 319)) (emphasis added).

This holding, however, did not resolve the confusion "in determining which offenders are in fact retarded." 536 U.S. at 317. That task was left to the states. *See id.* (quoting *Ford v. Wainwright*, 477 U.S. 399, 416-17 (1986)) ("we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences") (brackets in original).

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[11] The Court's proportionality analysis also takes into account evidence of a national consensus, where the Court looks to, among other things, state legislative enactments across the country. *See Penry v. Lynaugh*, 492 U.S. 302, 331 (1989).

Atkins did not, however, thrust the states into uncertain terrain. The majority's opinion adopted clinical definitions of mental retardation, which "require *not only* subaverage intellectual functioning, but *also* significant limitations in *adaptive skills* such as communication, self-care, and self-direction that became manifest before age 18." 536 U.S. at 318 (emphasis added). In so doing, the majority construed intellectual disability broadly:

> Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to *control impulses*, and to understand the reactions of others.

Id. (emphasis added).

As the Court's discussion reveals, reduced culpability was the *sine qua non* of its proportionality analysis, and the driving force underlying its adoption of a categorical rule prohibiting execution of the intellectually disabled. *See id.* at 318 ("[t]heir deficiencies do not warrant an exemption from

criminal sanctions, but they do diminish their personal culpability").[12]

B. An IQ Cutoff Precludes Probative Evidence of Intellectual Disability

1. In the Juvenile Context, Diminished Culpability is Not Based on IQ.

Lest there be any uncertainty, cases in *Atkins'* wake confirm the emphasis upon diminished culpability. *See, e.g., Thompson v. Oklahoma,* 487 U.S. 815 (1988) (prohibiting the execution of a minor who was under the age of 16 when the crime was committed); *Roper,* 543 U.S. at 551 (2005) (execution of individuals who were under 18 at the time of the crime's commission is prohibited by the Eighth and Fourteenth Amendments); *Graham v. Florida,* 560 U.S. 48 (2010) (the Eighth Amendment prohibits the imposition upon juveniles of life without parole); *Miller v. Alabama,* 132 S. Ct. 2455 (2012). In none of these cases was IQ the basis for sparing juveniles the death penalty. Nor should that be the case here.

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[12] The Court also suggested that neither retribution nor deterrence would be served by executing the intellectually disabled. *See Atkins,* 536 U.S. at 318 (*citing Gregg v. Georgia,* 428 U.S. 153, 183 (1976)) ("[u]nless the imposition of the death penalty on a mentally retarded person 'measurably contributes to one or both of these goals,' it 'is nothing more than the purposeless and needless imposition of pain and suffering' and hence an unconstitutional punishment." (quoting *Enmund v. Florida,* 458 U.S. 782, 798 (1982)).

In *Roper,* for example, the Court's adoption of a bright-line rule prohibiting the execution of juveniles relied upon scientific and sociological evidence demonstrating reduced culpability. *See Roper,* 543 U.S. at 569. The Court found, for example, that juveniles possess a "lack of maturity and a more underdeveloped sense of responsibility," which often results in "impetuous and ill-considered actions and decisions." *Id.*

Moreover, the Court found that juveniles experience "vulnerability and comparative *lack of control* over their immediate surroundings," and an "impetuousness and recklessness that may dominate in younger years." *Id.* at 570-71 (emphasis added); *see also Graham,* 132 S. Ct. at 2467 (citing "irresponsibility," recklessness," impetuousness," as reason to prohibit sentences of life without parole to for juveniles).

This, of course, did not mean that juveniles were *intellectually disabled,* but it "rendered suspect any conclusion that a juvenile falls among the worst offenders." *Id.* at 570. In the adult context, should a defendant score above a 70 on the Wechsler Adult Intelligence Scale, all of this evidence of other—and perhaps more relevant—impairments is rendered moot.[13]

Roper's reasoning applies by analogy to adults who are—or may be—intellectually disabled. In fact,

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[13] *See e.g.,* John Fabian, *"Forensic Neuropsychological Assessment and Death Penalty Litigation,"* THE CHAMPION, Apr. 2009, at 24, 25, *available at* http://www.nacdl.org/public.nsf/$$searchChampion.

Section 921.137(1) includes within its definition of adaptive behavior "the effectiveness with which an individual meets the standards of ... social responsibility." Where a defendant scores above 70 on an IQ test, however, Section 921.137, operates to preclude consideration of the very factors, such as impulse control and appreciation of the consequences of one's actions, that supported a categorical bar to the execution of minors. *See Roper,* 543 U.S. at 569-70. This flies in the face of *Roper,* which was not based on age *per se,* but on certain underlying characteristics about a group of offenders in a particular age group.

This case is no different—except that the number is based an IQ score, not a birth certificate. The critical distinction is that *Roper's* bright-line rule served a protective, even if potentially over-inclusive, function. In *Hall,* the IQ cutoff will most certainly increase the likelihood that a mentally disabled defendant will be executed. This strikes at the heart of what *Atkins* sought to protect.

Of course, while adults and juveniles are fundamentally different,[14] there is a small but legally significant overlap between juveniles and *intellectually disabled* adults that IQ cannot capture. For example, in adults, brain impairments such as frontal lobe disorder, which cause impulse control problems, are similar to the impetuousness that results from juveniles having "less experience with

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[14] In *Roper,* the Court explained that "the character of a juvenile is not as well formed as that of an adult. The personality traits are more transitory, less fixed." 543 U.S. at 569.

control over their environment." *Roper,* 543 U.S. at 569.

Thus, assuming, *arguendo,* that a defendant possesses these and possibly other cognitive deficits, they should be included in the intellectual disability calculus. They should not depend on whether a defendant scored a 69, 71, or 75 on the Wechsler Adult Intelligence Scale. Just as a juvenile's individual "background and mental and emotional development" must be considered to assess culpability, so too must the defendant who claims intellectual disability. *Miller,* 132 S. Ct. at 2467 (*quoting Eddings v. Oklahoma,* 455 U.S. 104, 116 (1982)). Section 921.137(1) permits such consideration—but only sometimes, and that is the problem. Like juveniles, adults with adaptive or developmental disabilities can—and often are—"less deserving of the most severe punishments." *Graham,* 560 U.S. at 68 (basing its finding of diminished culpability on psychology and developments in brain science). Under Florida's scheme, those who are "less deserving" may—and likely will—be executed. As the dissent below noted, "the current interpretation of the statutory scheme will lead to the execution of a retarded man."[15]

Section 921.137(1), lacks the type of individualized consideration that this Court requires in the death penalty context. For that reason, it is neither "arbitrary nor unnecessary" to hold that

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[15] 109 So.3d at 720 (Perry, J., concurring in part and dissenting in part).

Section 921.137(1)'s IQ cutoff is inconsistent with *Atkins* and does not comport with due process of law.

To be sure, in *Roper*, this Court held that the differences between juvenile and adult offenders were "too marked and well understood to risk allowing a youthful person to receive the death penalty." *Roper*, 543 U.S. at 572-73. The same is true here. *Intellectually disabled* adults are fundamentally different from *non-disabled adults*, making individualized consideration not only probative, but constitutionally imperative. Unlike *Roper*, however, this case involves the un-drawing of an unconstitutional line.

2. An IQ Cutoff Prohibits Some Defendants from Demonstrating Intellectual Disability.

Intellectually disabled defendants face particular challenges at trial, thus requiring the state to draft a statute with an eye toward inclusion, not exclusion. *See Atkins*, 536 U.S. at 317 ("some characteristics of mental retardation undermine the strength of the *procedural protections* that our capital jurisprudence steadfastly guards") (emphasis added).

As the *Atkins* Court held, "[m]entally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes." *Id.* at 320-21. All the more reason, therefore, to implement procedures that err on the side of caution, even if some offenders are unintended

beneficiaries. The Florida Supreme Court interpreted Section 921.137(1) to do less, not more.[16]

Stated simply, the states should enact procedures that identify adults who are less culpable, *not merely less intelligent.* That requires more than an IQ score.

To be clear, being *intelligent enough*—having an IQ score over 70—should not automatically mean that *you can never be considered intellectually disabled.* Likewise, a defendant might score *below* the cutoff but not necessarily be intellectually disabled. For that reason, individualized consideration requires courts to consider the additional factors, such as adaptive disability, that were enunciated in *Atkins* and recognized as relevant by the mental health community. An IQ cutoff prohibits this inquiry.

In *Hearn v. Quarterman,* for example, the Northern District of Texas rejected the state's argument that "mental retardation begins with IQ's of 70 or below." No. 3:04-CV-0450-D, 2008 WL 679030 at *4 (N.D. Tex. March 13, 2008). The court held as follows:

> Texas courts have in fact held otherwise. Although noting that "significantly subaverage intellectual functioning is defined as an IQ of about 70 or below," the Texas Criminal Court of Appeals...explained that

> "[p]sychologists and other mental health professionals are flexible in their assessment of mental retardation; thus, sometimes a person whose IQ has tested above 70 may be diagnosed as mentally retarded while a person whose IQ tests below 70 may not be mentally retarded." Although it is not clear on what other (non-IQ) basis the intellectual functioning prong can be established, or whether there is an IQ threshold above which a diagnosis of mental retardation is precluded, *Briseno* appears to suggest that *clinical judgment, beyond strict adherence to IQ test results, can support a diagnosis of mental retardation*

Id. at *4 (*quoting Ex Parte Briseno,* 135 S.W.3d 1, 7 n.24 (Tex. Crim. App 2004) (emphasis added). The court also cited the American Association of Mental Retardation's three-pronged diagnostic principles, which were relied upon in *Atkins,* and "do not intend there to be a fixed IQ cutoff point." *Id.* at *4. Instead, they "emphasize the importance of exercising clinical judgment in determining how to interpret and apply the three definitional prongs to diagnosing mental retardation each individual case." *Id.*

The Florida Supreme Court's interpretation of Section 921.137(1) might pass muster if IQ tests identified sub-average *adaptive skills.*[17] They do not.

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[17] Section 921.137(1) defines adaptive behavior as "the effectiveness or degree with which an individual meets the

What an IQ test cannot measure, however, should not be the basis upon which to execute an individual who, if given the opportunity to present evidence of adaptive deficits, might be among those that *Atkins* intended to spare.

An IQ score, while relevant, does not give us the whole picture. Thus, it should not automatically foreclose preclusion of additional testimony regarding adaptive deficits, such as impulse control.[18] This would, in effect, ignore the definition of intellectual disability that *Atkins*—and most clinicians—endorse. Yet, this is precisely what Section 921.137 does—as the dissent below acknowledged. *See Hall*, 109 So. 3d at 718 (Perry, J. concurring in part and dissenting in part) ("the [Florida Supreme] Court was constrained by the language of the statute and found that an IQ higher than 70 failed to meet the first prong of section 921.137(1), and that no further inquiry was necessary").

3. Hall's Case Underscores the Problems with IQ Cut-Offs.

Professors Lamparello and MacLean express no opinion as to how a court would—or should—rule if Hall's entire background were considered regardless of his IQ—which has fluctuated below and above the statutory threshold.

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standards of personal independence and social responsibility expected of his or her age, cultural group, and community."

Based upon the evidence, however, it appears that, had the Florida Supreme Court—or Section 921.137(1)—authorized a more individualized inquiry, it would have been faced with a mountain of evidence that Hall suffered from organic brain damage, emotional disturbances, physical abuse, mental illness, torture as a child, and learning disabilities; if the *Hall* opinion were affirmed, none of this evidence could even be considered. *Id.* at 718-19.

Arguably, therefore, Hall's background reveals disabilities in "reasoning, judgment, and control of...impulses," which Atkins held to be indicative of those who "do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." *Id.* at 719 (Perry, J., concurring in part and dissenting in part) (*quoting Atkins,* 536 U.S. at 306).

This is precisely why the dissent criticized the Florida Supreme Court's "dogged adherence to a bright-line cutoff of a 70 on an IQ test" as leading to an "absurd result." *Id.* at 720. That approach establishes a "threshold for the courts *to even consider retardation,*" which in this case prohibited Hall from "attempting to demonstrate *concurrent deficits in adaptive functioning to establish retardation.*" *Id.* at 720 (emphasis added).

Ultimately, the Florida Supreme Court's interpretation renders *Atkins* more illusory than real. As the dissent noted, "[i]f the bar against

executing the mentally retarded is to mean anything, Freddie Lee Hall cannot be executed." *Id.* at 718.[19]

Professors Lamparello and MacLean respectfully submit that "evolving standards of decency as evidenced by a maturing society" require courts to correct injustices as new information arises. In the context of intellectual disability, it has.

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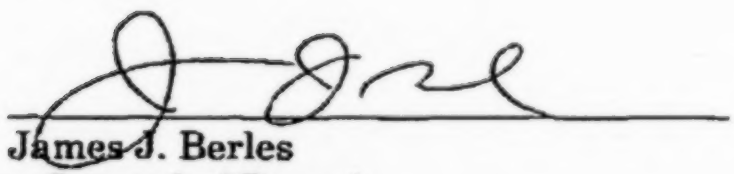
[19] That the defendant may nonetheless use evidence of intellectual disability in mitigation does not render the Florida courts' interpretation of Section 921.137(1) constitutional. *See Atkins*, 536 U.S. at 321 ("reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury").

CONCLUSION

The judgment of the Florida Supreme Court should be reversed.

Respectfully submitted,



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